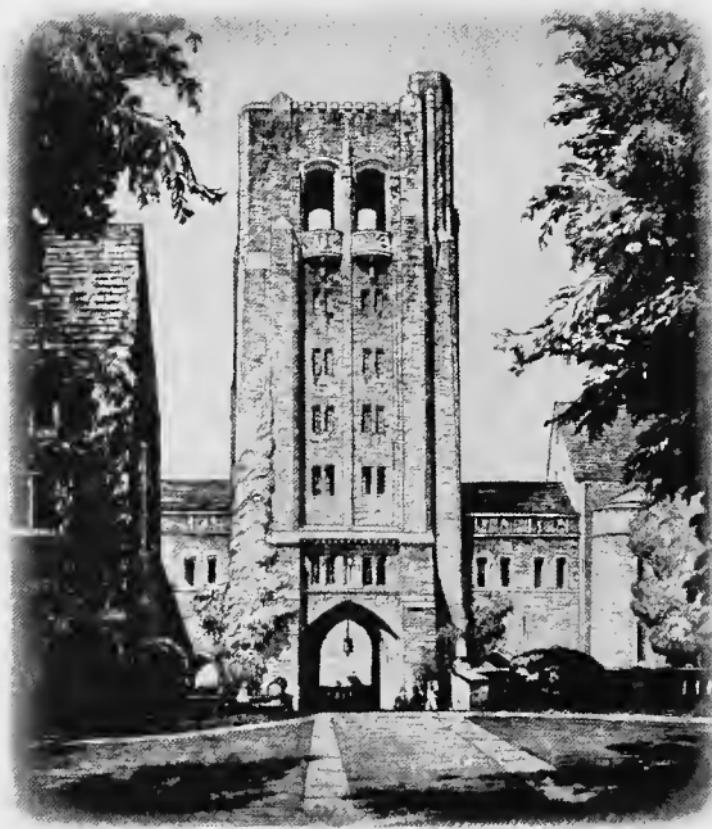




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**Outlines of the science of jurisprudence**



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OUTLINES  
OF  
THE SCIENCE OF JURISPRUDENCE.

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OUTLINES  
OF  
THE SCIENCE OF JURISPRUDENCE.

*AN INTRODUCTION TO THE SYSTEMATIC  
STUDY OF LAW.*

Translated and Edited from the Juristic Encyclopædias  
OF  
PUCHTA, FRIEDLÄNDER, FALCK, AND AHRENS,

BY

W. HASTIE, M.A.,

TRANSLATOR OF 'KANT'S PHILOSOPHY OF LAW,'  
'THE PHILOSOPHY OF ART,' BY HEGEL AND C. L. MICHELET;  
PÜNZER'S 'CHRISTIAN PHILOSOPHY OF RELIGION,' ETC.

EDINBURGH :  
T. & T. CLARK, 38 GEORGE STREET.  
1887.

‘*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*’—ULPIAN.

‘*Ex intima hominis natura haurienda est juris disciplina.*’—CICERO.

‘*Non tamen dubito quin præcepta quædam . . . certiora tradi possint, si quis . . . certam rationem ineat; et alia cum aliis comparans, alia ex aliis nectens provehatur altius.*’—BODIN.

‘*At scientiam juris et practicam, auxiliaribus libris ne nudanto, sed potius instruunto.*’—BACON.

‘*Sed tutissimum Mnemonicæ genus est Methodus solida et accurata.*’—LEIBNIZ.

‘*It may be asserted, without injustice to Bentham or to Austin, that works upon legal system by English writers have hitherto been singularly unsystematic.*’—Professor HOLLAND.

In Memoriam,  
A. A. HASTIE S.S.C.

OBIIT NONIS JANUAR. MDCCCLXXXVII.

Quis desiderio sit pudor aut modus  
Tam cari capit is?

---

We men, who in our morn of youth defied  
The elements, must vanish ;—be it so !  
Enough, if something from our hands have power  
To live and act and serve the future hour ;  
And if, as toward the silent land we go,  
Through Love, through Hope, and Faith's transcendent  
dower,  
We feel that we are greater than we know.

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## TRANSLATOR'S PREFACE.

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'THE prospects of the Science of Jurisprudence, especially in England, will depend largely upon a greater familiarity than has hitherto been encouraged in Legal Education, with the vast and invaluable Juridical Literature of Germany. It happens, indeed, that in no other department of Knowledge is it so hard to apprehend the best Conceptions hitherto attained, without a familiar acquaintance with German Philosophical language, as in Jurisprudence. Modern Jurisprudence is emphatically a German creation. Kant, Hegel, Hugo, Savigny, Thibaut, Falck, and their laborious and not unworthy successors, have stamped their Personality, their Nomenclature, their Ethical tone, their Methods of Philosophical analysis, far too ineffaceably upon the Science of Jurisprudence to be only read at second hand by any Student who would penetrate to the profoundest depths of that Science.'

These words of Professor Sheldon Amos,<sup>1</sup> one of the most loyal and learned representatives of the contemporary School of English Jurisprudence, might of themselves suffice to justify and explain the purpose and purport of

<sup>1</sup> A Systematic View of the Science of Jurisprudence, by Sheldon Amos, M.A., of the Inner Temple, Barrister-at-Law, Professor of Jurisprudence, University College, London, etc. p. 505.

the present work. It is an attempt to bring the best available thought and experience of these Masters of the Modern German Jurisprudence to bear upon the acknowledged want of a more scientific and systematic discipline in the study of Law in England. Its aim is to introduce the Student to the fundamental conceptions and the articulated structure of Jurisprudence in its latest scientific development, so that he may build his subsequent knowledge of positive Law upon the deepest and surest foundations, and secure it by the strong support and the harmonious co-operation of established principles. It exhibits the habit of essential thinking and the formal methods of investigation which have constituted the most vital conditions and factors in the magnificent development of Juristic Science in Germany during the present Century, and which from their philosophical and scientific nature readily admit of universal application and use. It also indicates the means and appliances of Juristic Study in detail, with a Baconian practicality and sobriety that must dispel the illusion that great achievements in this sphere are due to the exceptionabilities of genius, and which show at the same time that here too, as in the physical sciences, the success of discovery is the crown of patient methodized industry and of the faithful ministration of interpretative thought. It further sketches the historical development of Jurisprudence as the onward sweep of human thinking in this most cardinal department of social effort and creation, and it points to the living problems and possibilities that remain to quicken and stimulate to even higher endeavour. And this is done in the simplest form, by the hands of acknowledged Masters who have sounded all the depths and shoals of their science in the search for solid truth and fruitful

possession, and who have had their right to lead and guide authenticated by the fidelity of their enthusiastic scholars and the consequent deepening and enriching of knowledge in every department of their Science. The merits and claims of the contents of the following pages might thus be safely rested upon the authority, reputation, and success of the learned Authors whose modes of thought and teaching they represent.

But it is their relation to the present condition and requirements of Jurisprudence in England that has prompted and must justify the attempt to make these German Outlines of the Science of Jurisprudence more directly available for the English Student. The subject of Legal Education has been one of the practical problems in England during the last fifty years, and it is always more and more engaging the thought of the most distinguished Jurists in our country, who are keenly alive to the important bearings of this question, and are putting forth their best efforts at present in dealing with it.<sup>1</sup>

<sup>1</sup> The question cannot be discussed in detail here, but the whole of this work, and especially Parts III. and IV., may be considered from this point of view.—Mr. R. Campbell, in the 'Introduction' to his Student's Edition of *Austin's Lectures on Jurisprudence*, has given an interesting sketch of the efforts made to improve the system of Legal Education in England since Austin's advocacy of the subject in 1834. Reference may also be made to the recent discussions of the question by Professor Pollock (*Essays in Jurisprudence and Ethics*, I., 1882, and his Lectures on *Oxford Law Studies* in the Law Quarterly Review, Vol. II., 1886), Professor A. V. Dicey (*Can English Law be taught in the Universities*, 1883), Professor E. C. Clark (in his Article on *Jurisprudence, its use and its place in Legal Education*, Law Quarterly Review, Vol. I., 1886), Professor Holland (in the Preface to his *Elements of Jurisprudence*), and Professor Sheldon Amos (in his *Systematic View of the Science of Jurisprudence*, pp. 490–507).—Dr. Grueber, in an interesting review of Dr. Von Holtzendorff's *Encyclopädie* (a work referred to below at p. 276), has summed up the position in the following vigorous and relevant terms: 'During the last thirty or

The question has naturally emerged in consequence of the vast extension of the knowledge of Legal Systems, the recent application of the historical and comparative method to the study of Law, the inflow of more philosophical and scientific conceptions into contemporary judicial literature, the necessity of realizing the essential and organic connection of Jurisprudence with the whole domain of social and political science, and the consequent demand for a practical elevation of the Legal Profession in accordance with its new ideals and responsibilities. The present work may be regarded generally as an elementary contribution to this desideratum of a more scientific Legal Education, based upon earnest conviction of the essential relation of Theory to Practice, and dealing with the existing want at that initial and vital stage in which the conditions of all real progress and attainment are cardinally determined.

forty years a very strong movement has taken place in this country in favour of the promotion of systematic legal studies. English people want to attain a comprehensive view of their own law, but they find it scattered about in thousands of Acts of Parliament and in endless volumes of Law Reports, and thus a knowledge of law is necessarily limited to those who make it their special study and profession. This state of things is not better than it was in ancient Rome, where law was a mystery, the knowledge of which was confined to the Patrician priesthood. We may say it is still worse, for even English Lawyers do not know the principles of the *whole* sphere of law, being in want of the means to get a comprehensive view of it.' (Law Quarterly Review, Vol. I. p. 62.)—Of the discussions of the subject in German, reference may specially be made to Bluntschli's *Die neuern Rechtsschulen der deutschen Juristen*. Zweite, mit Reformvorschlägen erweiterte Auflage, 1862.—The unsatisfactory condition of Legal Education in France is discussed with great earnestness and frankness by MM. Durand and Terrel in their Preface to their recent French translation of Professor Diodato Lioy's *Philosophie du Droit*, 1887. This Preface presents a great deal of interesting information regarding the teaching of Law in the Universities of different countries. Professor Lioy's able and important work has been translated into French in order to quicken and promote reform in Legal Education in France.

As in every other scientific discipline, the true Methods and Elements of Legal Education are necessarily determined by the condition of the Science itself, and their highest function is to become instrumental in promoting the further progress of the Science. They have at once to embody, to sustain, and to reproduce its vitality. *Et quasi cursores vitae lampada tradunt.* They have to exhibit the forms of the current movement, to act as the freshest vehicles of its spiritual life, and to regenerate the energy of new activities. Working under the inevitable and visible conditions of human change by perpetual decay and renovation, the Science of Jurisprudence must also change and adapt its methods with the varying surroundings and forces of the time. Nor will the consequent variations in its external history, and the constant supersession of the limitations of the particular schools, furnish, when rightly understood, any argument against its healthy vitality as an organism, or against its scientific certainty and unity.<sup>1</sup> On the contrary, these must be regarded as the very conditions and evidence of its inherent life and development and identity. But the energy of the essential movement must be accompanied by a corresponding flexibility of form, if the harmony between the outer matter and the inner spirit of the Science is to be maintained, and if it is to realize itself in the total organism of human knowledge. And, conversely, the light and activity of thought must give relation and order to the otherwise chaotic mass of the

<sup>1</sup> The doubt as to the scientific dignity of Jurisprudence goes beyond Bacon, and is at least as old as Durantis: 'Dicunt quidam, volentes detrahere scientiæ juris, quod scientia juris non sit proprie scientia, cum scientia sit de incorruptibilis et de impossibilibus aliter se habere.' (*Speculum Juris, Praef.* 30.)

manifold and ever-multiplying phenomena of the Science, if the historic process is to be spiritually controlled so as to be made subservient to the illumination of the individual and to the good and progress of society. In short, the form and matter of this, as of every other Science, must mutually condition each other, and its Methods, both of discipline and of research, must change and advance with the movement of the social life generally.

Under this general presupposition, it requires no profound knowledge of the present condition of Jurisprudence in England to discover the fact that the Science is in a state of transition, both as regards its formal principles and its practical relations. Here, too, the fundamental question of Method and rational Verification has been quickened by a keen sense of the inadequacy of the traditional forms to embrace essential positions. The fertile genius of Bacon was at home in the sphere of Law, but his very familiarity with its details, and his official subordination to its authority, made his handling of the Methods of Jurisprudence in his *Encyclopædic* survey of human science less novel and incisive than in the case of other forms of knowledge. He, indeed, recognised the science of Universal Jurisprudence as the crown of all human philosophy, emphasized its essential connection with the Art of Government, and pointed to the cardinal importance of an investigation of the Sources of Law; and, faithful to the practical spirit of the Jurisconsult and his own orderliness of thought, he has given many suggestive hints regarding the treatment of the concrete details of Law, and anticipated not a few of the later conceptions of legal reform. But he inaugurated no important new method in this sphere, nor did he point the way to any

permanent universal discovery as to the nature of Right.<sup>1</sup> Selden anticipated to some extent the natural principle of Grotius, by whom he was styled 'the glory of England ;' but he failed to methodize it, or even give it the rational independence necessary for evolving a system.<sup>2</sup> The empirical principle of the Baconian method received its logical and powerful development at the hands of Hobbes ; but his doctrine of absolute and irresponsible sovereignty as the basis and source of legal right, was almost unanimously rejected in England for more than a century.<sup>3</sup>

<sup>1</sup> The contributions of Lord Bacon to Jurisprudence are contained in the *De Augmentis*, Lib. VIII., and his *Leges legum*. They are incomplete and fragmentary, but their practical sagacity and sobriety are everywhere apparent. They have been more studied and quoted by Continental than by English Jurists ; and they have been several times published on the Continent for juristic study (*De fontibus juris*, Paris 1752. Latin and French Ed. by Devauxelles, Paris 1824). Lermimier designates him 'the successor of Bodin,' but sums up his estimate in the following terms : 'Bacon à surtout envisagé la Jurisprudence sous les rapports politiques et pratiques. Ainsi considére, son opuscule a de la valeur ; clair, jndicieux, aphoristique, il est beaucoup lu et souvent cité. Mais, quant à la philosophie et à la theorie du droit, il ne saurait avoir de rang et d'importance dans l'histoire de la science.' (Introduction à l'histoire du Droit, p. 89.) Walter, Falck, and others quote approvingly from Bacon. See Friedländer's account of his position, *infra*, p. 245. Dr. D. Caulefeld Heron, in his *Introduction to the History of Jurisprudence* (1860), has given a full and appreciative summary of Bacon's Legal Treatises.

<sup>2</sup> Selden's principal works are his *Mare clausum*, 1635 (written in opposition to the *Mare liberum* of Grotius, in which the great Dutch Jurist claimed for his countrymen the right of free navigation to the East Indies) ; *De jure naturali et gentium juxta disciplinam Hebraeorum*, 1640 ; *De successionibus in bona defuncti ad leges Hebraeorum*, etc., and his Preface to the *Fleta*, a commentary on the Law of England.

<sup>3</sup> Mr. Austin's complaint, that the main design of the writings of Hobbes (*De Cive*, 1642 ; *Leviathan*, 1651) has been 'grossly and thoroughly mistaken by his modern censors, French, German, and even English,' is almost wholly groundless. Hobbes was too distinct, emphatic, and outspoken in the statement of his principles and purpose to be materially misunderstood. The Continental Historians of Philosophy have generally

The great English Lawyers from Bracton to Blackstone, were mainly dependent for their general conceptions upon the practical reason embodied in the Common Law or the formal definitions of the Roman Jurists, and the doctrine of natural or rational Right obtained no profound investigation nor any independent exposition from them. It was with the entrance of Jeremy Bentham into the domain of Jurisprudence as an advocate of the reform of Legislation, that the tendency to investigate fundamental principles by a free and independent method took shape. Striding in the paths of Bacon and Hobbes, and animated by a supreme scorn for the verbal pedantry of the traditional formalists, Bentham compelled the juristic spirit to enter into more practical and vital relations, and to realize more clearly its function and purpose in the common movement of the national life.<sup>1</sup> John Austin, as the disciple and follower of Hobbes and Bentham, applied an acute and persevering analysis to the concrete material of Law, in order to determine the elements and relations common to the legal systems.<sup>2</sup> And, as the chief representative of what is now known as the 'Analytical School of English

done justice to Hobbes ; and the historical Jurists, from Lerminier to Stahl and Ahrens, have been equally impartial and appreciative of his genius. The narrowness and ill-nature of the theological controversy in England (in which Hobbes paid back the charges of most of his assailants with compound interest) must be admitted, yet Austin has not essentially modified the common conception of Hobbes's doctrines. Nor has even the latest expounder of Hobbes, — Professor Croom Robertson, — with his more temperate and careful treatment, affected the received view of the Philosopher of Malmesbury.

<sup>1</sup> Fragment on Government, 1776. Principles of Morals and Legislation, 1780.

<sup>2</sup> Province of Jurisprudence determined, or Philosophy of Positive Law, 1832. Edited, with other two volumes of Lectures on Jurisprudence, by his widow, Sarah Austin. Later and better Edition by R. Campbell. Also an abridged *Student's Edition*, by R. Campbell, 1875.

'Jurisprudence,' Austin has pre-eminently ruled the Legal Education and determined the Legal Modes of Thought in England during the past fifty years.<sup>1</sup>

It is not necessary to deprecate the merits or the achievements of the Analytical School in advocating advance to a more philosophical and comprehensive standpoint. To Bentham and Austin, England owes much that is of substantial value in Legislation and of permanent significance in Jurisprudence.<sup>2</sup> The robust energy and practical expediency of Bentham were in place in dealing with the overgrown and entangled confusions of Right in the great jungle of English Law, and he furnished a ready criterion to guide the more beneficent spirit of the new Legislation at the outset of its career of reform. Almost all the particular reforms, advocated by him with so much sagacity and vigour, have been realized ; the abuses they have abolished are already almost forgotten ; and the movement towards the simplicity and equality of a codified body of Law has all but reached its goal. Austin supplemented the larger work of Bentham by his patient and ingenious analyses in detail, and he has done much to discipline and sharpen the juristic intellect, as well as to inspire it with fresh courage and confidence in the resources of Jurisprudence. But the

<sup>1</sup> This holds practically at present. As Professor Pollock says, 'To English Students it (Jurisprudence) means at present, the two volumes of Austin's Lectures, or, the one volume into which this matter has been more lately condensed by his able Editor.'—The London University still makes the study of Austin fundamental.

<sup>2</sup> Sir Henry Sumner Maine has clearly pointed out the characterizing distinction between Bentham and Austin : 'Bentham in the main is a writer on Legislation. Austin in the main is a writer on Jurisprudence. Bentham is chiefly concerned with law as it might be and ought to be. Austin is chiefly concerned with law as it is.'—*Early History of Institutions*, p. 343.

unhistorical and unphilosophical character of the Analytical School, and the limitation and relativity of its positions, have been coming always more clearly into view. Its most appreciative reviewer admits that 'it is desirable to get rid of a great deal of exaggeration with which Austin's work has been surrounded.'<sup>1</sup> The wilful and untenable narrowness of the Austinian System has been glaringly demonstrated by the progress of historical research. The solid and brilliant expositions of Ancient Law and Custom by Sir Henry Sumner Maine have shown how little Austin had really caught of the broad spirit of the Historical School, and they convincingly prove the utter inadequacy of the analytical Theory of Sovereignty to explain the origin, nature, or range of even Positive Law.<sup>2</sup> Mr. Herbert Spencer has followed with a crushing criticism of the doctrines of Bentham and Austin as void of scientific foundation, self-contradictory, and even unthinkable in themselves, inconsistent with the whole social evolution, and as unjust and undesirable in practice.<sup>3</sup> Finally, the more philosophically and

<sup>1</sup> Mr. Frederic Harrison, in three valuable Articles on 'The English School of Jurisprudence' in the Fortnightly Review, vols. xxiv.-xxv. (1878-9). Mr. Harrison says summarily that 'the theory of Austin contained little that was in any sense new; it may be reduced to a small number of very simple propositions; and the truth of these propositions has been asserted in much too absolute a way.'

<sup>2</sup> Sir H. S. Maine's discussion of the Analytical School is an irresistible demonstration of the inadequacy of Austin's theory, carried on with convincing logic and ample knowledge. It should be carefully read by the student (*Early History of Institutions*, Lects. xii. and xiii.). Mr. W. Galbraith Miller has concisely put the argument thus: 'Law existed ages before legislation, and early legislators disclaimed any intention of making law as much as modern judges are in the habit of doing. The theory, so far as it goes, applies only to a few late laws consciously evolved and expressed.'—*Philosophy of Law*, p. 16.

<sup>3</sup> This vigorous and unexpected onslaught is contained in Mr. Spencer's

classically trained Jurists, who are now leading the juristic thinking of England, are unanimous in their recognition of the defects, and even of the untenableness, of the cardinal positions of the Analytical School.<sup>1</sup> If

remarkable discussions, reprinted from the *Contemporary Review*, under the title 'The Man *versus* the State' (1884). Among other drastic utterances it is said: 'From whatever point of view we consider it, Bentham's proposition proves to be unthinkable.' 'Bentham's proposition leaves us in a plexus of absurdities.' 'But first prove your unlimited sovereignty? To this demand there is no response.' Mr. Spencer also continues Sir H. S. Maine's refutation by abundant evidence drawn from even the lowest tribes.

<sup>1</sup> Thus Professor Holland says: ' "The Province of Jurisprudence determined" is indeed a book which no one can read without improvement. It presents the spectacle of a powerful and conscientious mind struggling with an intractable and rarely handled material, while those distinctions upon which Austin, after his somewhat superfluously careful manner, bestows most labour are put in so clear a light that they can hardly again be lost sight of. The defects of the work are even more widely recognised than its merits. It is avowedly fragmentary. The writer is apt to recur with painful iteration to certain topics, and he leaves large tracts of his subject wholly unexplored,' etc. (*Elements of Jurisprudence*, p. vii.). Professor Pollock says: 'In any case, it is not desirable that Austin's work should remain for an indefinite time the only means of improvement in this department of knowledge available for our seats of learning' (*Essays*, p. 1). The judgment of Professor E. C. Clark, with which he sums up a discussion of the subject, will probably be accepted by all who have earnestly considered it: 'Considerations such as these point to the supersession of Austin's Jurisprudence except as an exercise for more advanced students who can weigh and criticise their author instead of swallowing his somewhat arbitrary dogmas' (Law Quart. Rev. i. 205). A good deal has been said regarding Austin's style and manner, which are anything but classical or attractive. Thus Professor Pollock says: 'Austin's painfully laboured style has an effect amounting to repulsion on some persons, of whom I confess myself to be one; and he describes the English student as 'parched with the stern limitations and the crabbed analysis of Austin.' Mr. Spencer likewise refers to 'the exasperating pedantries—the endless distinctions and definitions and repetitions—which serve but to hide his essential doctrines.' These are conspicuous and trying defects, but they naturally correspond to the mechanical and external character of Austin's mode of thought.

in Scotland and on the Continent the discussion of the Austinian Jurisprudence has been less keen, it has been because its cardinal doctrines have found little or no acceptance where the movement of juristic thought was firmly based upon the fundamental principles of the Roman Law, and where, in consequence of the characteristics of the spirit of the people, the standard of Utilitarianism and the conception of absolute Sovereignty found less congenial soil than they did in England.<sup>1</sup>

It thus appears that the Utilitarian and Analytical Jurisprudence, as hitherto received, is no longer regarded by our best authorities as a tenable system of Jural Doctrine, nor consequently as a sound basis of Legal Education. And the more closely we scrutinise its

<sup>1</sup> Professor Lorimer, in the Preface to his 'Institutes of Law,' says: 'Utilitarianism, as anything more than a phase of the inductive method, scarcely crossed the Border, and never crossed the Channel at all. But so firm was the hold which it took on England in the last generation, that to many of my elderly and middle-aged readers the possibility of its "utility" being called in question has probably never presented itself. On the other hand, it is rare, I believe, even in England to find a Benthamite *pur sang* who is under forty. I do not think one has turned up among my students for the last ten years, though many of them have been graduates of the English Universities; and before another decade elapses' [written in 1880] 'the preference for the older and grander traditions which Grotius inherited from Socrates, "the great lawyer of antiquity," as Lord Mansfield called him, through the Stoics and the Roman Jurists, over those which Bentham transmitted to Austin, will, I hope, be as universal and as unequivocal as that for classical and mediæval architecture over the architecture of the Georgian era has already become.' On the other hand, the Austinian doctrines have found a competent and vigorous advocate at the antipodes in *The Theory of Legal Rights and Duties, An introduction to Analytical Jurisprudence*. By the Hon. William Edward Hearne, LL.D. (Melbourne) 1883. The Utilitarianism of Bentham has been carefully discussed on the Continent (see Kant's *Philosophy of Law*, xxv., note), but Austin has been almost entirely ignored.

elements and relations, the more clearly and irresistibly does this appear. The system is entirely empirical and contingent in its basis and method. It is a one-sided development of unrationalized sensationalism, individualistic determinism, and political materialism. It starts from the accident of a particular Sovereignty, which it consecrates as absolute ; abjures the rational liberty of the individual, which it sacrifices to the lower hedonistic impulse, and culminates in a glorification of the existing order as equally beyond the reach of praise or blame. In making all Right 'the creature of Law,' and all Law the creation of arbitrary will, it deliberately shuts itself off from the very well-springs of human life and the most powerful factors of human activity and progress. It deals with the living products and relations of will as if they were but physical compounds and forces, the results of mere mechanical conjunction and inorganic accretion in space. Even its most humane constituent, the rule of Utility, when fairly looked at, furnishes but a contingent, limited, and relative criterion of Right.<sup>1</sup> In its very expression it is contradictory of the great modern principle of Political Equality, and in its practical working it must ultimately show itself to be unjust. If the rule of 'the greatest Happiness of the greatest number'<sup>2</sup>

<sup>1</sup> It has been pointed out by Ahrens that the ancient division of the Roman Jurisprudence is founded upon the notion of Utility, 'Hujus studii duæ sunt positiones, publicum et privatum. Publicum Jus est quod ad statum rei romanæ spectat, privatum, quod ad singulorum utilitatem ; sunt enim quædam publice utilia, quædam privatum.' Dig. I. 1. § 6. But he also points out the essential limitations of the Roman Doctrine of Right, and he accepts Ihering's suggestive definition of it as 'the system of reasoned egoism' (*Cours*, 49, 259).

<sup>2</sup> Professor G. Carle, in his admirable work, *La vita del Diritto nei suoi rapporti colla Vita sociale*, has traced the development of the Utilitarian principle from its unmodified egoistic expression in Hobbes through the

is to determine the ultimate validity of Law and the distributive creation of Rights, on any application of it there will still be a relative, or even an absolute, inequality before the Law, while the measure of the capacity for realizing happiness must always depend upon the varying conditions and caprice of the individuals who are most favoured under it. The claims of minorities have as little security in such a system as those of indeterminate numbers have had under the egoistic tyranny of aristocratic Slave States. And besides the variability and limitation of the utilitarian principle, both in its objects and its subjects, the system provides no guarantee for its regulated or permanent application to society. The will of even a despotic benevolence cannot be made infallible or hereditary; and in working such a principle, it must continually be thrown at the best into contradiction with itself as well as brought into collision with the natural wishes and expectations of the recipients of its beneficence.<sup>1</sup> Under any other form the utilitarian State is at the highest but an artificial combination of individuals for securing 'the maximisation of happiness,' which simply means the greatest amount of pleasure possible within a certain area. In the case of such subjective and fluctuating conditions as are implied in 'Happiness,' it mustulti-

formula of Helvetius—'the utility of the greater number of men' subject to the same government—to the 'general interest well understood' of Bentham, the generalized Utilitarianism of John Stuart Mill, and the Altruism of Mr. Herbert Spencer. See the excellent section, *La scuola utilitaria nelle scienze giuridiche e sociali*. Lib. iii. cap. ii. § 3. Reference may also be made to the discussion of the Utilitarian School by M. Guyau in his careful work, *La Morale Anglaise contemporaine. Morale de l'Utilité et de l'Evolution*. Paris 1879.

<sup>1</sup> Kant has pointed out that 'a *paternal* Government (*regimen paternale*) is the most despotic Government of all, the citizens being dealt with by it as mere children.' *Philosophy of Law*, p. 171.

mately come about that 'the greatest number' will claim and assert the right to determine in what their 'greatest Happiness' really consists, and everything inconsistent with it at the time will have to yield under the set march of the system. Political Utilitarianism is thus incompatible with the older doctrine of absolute Sovereignty, which inevitably becomes limited and superseded by popular representation and government, unless it forcibly adhere or violently revert to its original form of Divine Right or of arbitrary power. The expansion and increase of the rights embodied in the community, even under the express sanction of Law, thus gradually lead to a more conscious, inward, and essential realization of the Principle of Right; and the rule of Utility, although irresistible as a test of the relative suitability of the particular outward forms of Law to the working conditions of the community, can neither create nor secure Rights,<sup>1</sup> nor supply an organic principle capable of maintaining or restoring the universal order of society when the 'dormant anarchy' of its elements may

<sup>1</sup> Mr. Herbert Spencer, with more than his usual vigour and incisiveness, has refuted the theory of the creation of rights according to the Utilitarian and representative system of Government by an ingenious *reductio ad absurdum*: 'Bentham tells us that government fulfils its office "by creating rights which it confers upon individuals; rights of personal security; rights of protection," etc. . . . Mark, now, what happens. . . . The sovereign people jointly appoint representatives, and so create a government; the government thus created, creates rights; and then, having created rights, it confers them on the separate members of the sovereign people by which it was itself created. Here is a marvellous piece of political legerdemain! Mr. Matthew Arnold, contending that "property is the creation of law," tells us to beware of the "metaphysical phantom of property in itself." Surely, among metaphysical phantoms the most shadowy is this which supposes a thing to be obtained by creating an agent, which creates a thing, and then confers the thing on its own creator!' *The Man*, etc., 88.

become quickened into the awakening confusion of fresh life and energy.<sup>1</sup>

Mr. Austin does not seem to have realized the true bearing of the political and social process on the Principle of Right any more than he apprehended the conditions of its historical evolution or its psychological basis. He deals with Jurisprudence in the narrowest and the most mechanical way. Limiting the sphere of the Science to the empirical facts of Positive Law, and proceeding upon the false postulate of the universality of an unlimited Legislative Sovereignty, he simplifies the juristic problem, merely by evading its difficulties and reducing it to comparative insignificance. It has been well said that 'the Austinian view of Sovereignty really is the result of Abstraction.'<sup>2</sup> And so it is ; for it is the most jejune, lifeless, barren, and isolated conception of Sovereignty that can be held. Under it, Law becomes but the *caput mortuum* of a mechanical dissection ; Right, the factitious accident of

<sup>1</sup> It would be interesting to examine into the relation of the Utilitarian teaching to the social discontent and discord of the time, and to the crop of difficult and testing problems with which the Political Utilitarianism of the Government is at present struggling. It is now universally evident, from the spread of Socialistic and Communistic theories, that the movements of the national life will be more and more determined by the notions of Right that obtain hold on the community ; and hence the increasing urgency for sound doctrine and teaching. These questions cannot be dealt with in introducing this elementary work, but an attempt may be made to review them in some further discussion of the Schools of Jurisprudence from a more comprehensive point of view.

<sup>2</sup> Sir Henry Sumner Maine. 'It is practically most necessary that the student should hear in mind—because it does most to show what the Austinian view of Sovereignty really is—that it is the result of Abstraction. It is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force.' *Early Institutions*, p. 359. This criticism recalls Hegel's designation of the Roman Empire as 'abstracte Herrschaft.'

an arbitrary despotism. The view was rested upon insular and limited knowledge, and it has been disproved by every subsequent examination into the nature of Custom and the origin of Civilisation. It is oblivious of the simplest facts in the Science of Mind; it ignores the mental character of mental products, and even forgets that the most rudimentary Sovereignty must involve a motive and a reason. 'A despot with a disturbed brain is the sole conceivable example of such Sovereignty.'<sup>1</sup> The Austinian theory is equally incapable of explaining Government, rationalizing Society, unifying facts, or furnishing anything like a genuine 'Philosophy of Positive Law.'<sup>2</sup>

<sup>1</sup> Sir H. S. Maine, *Early Inst.* p. 359.

<sup>2</sup> There is, of course, no desire to under-estimate Mr. Austin's work, while testing it by the severe but impartial standard of the scientific judgment. The Utilitarian School, taken as a whole, is admitted by continental jurists to be a distinctively English product, and it has won a permanent place in the history of political thought. It is justly a subject of reasonable 'national pride,' as Professor Carle says (*La vita del diritto*, 444); but we must not be blind to its insular limitations, and the fact that it has narrowed the juristic thought of England by concentrating it upon a practical side-issue for two generations. Mr. Austin was a man of the noblest character; and the beautiful and pathetic tribute to his high endeavour and purity of purpose by his accomplished and devoted wife, cannot be read without a thrill of mingled admiration and regret. But he wanted essential insight, and even the enlightenment of a large philosophical culture to supply its place, nor did he ever work himself out of the prepossessions of his narrow training into full independence and liberality of thought. Mr. Herbert Spencer has remarked that Austin's early discipline in the army seems to reappear in his theory of sovereignty, which is quite akin to the idea of an outward military despotism. It appears from the sketch of his life by his widow that he had latterly no sympathy with the new political liberalism, which is really the logical result of the application of Bentham's principle to the Modern State. She says, 'It may easily be imagined he regarded with a sort of horror all schemes for placing the business of legislation in the hands of large bodies of men.' 'The idea of popular legislation was to him as alarming as it was absurd.' And in expounding his principle of

The scientific and practical inadequacy of the Utilitarian and Analytical School points on its various sides to the desiderata at present essential in any attempt at a more satisfactory treatment of Jurisprudence in England. It is evident, in the first place, that the Principle of Right must be rescued from its temporary deposition by Bentham and Austin, and raised again to its legitimate place in the forefront of the Science. The *ὑστερον πρότερον* of the Analytical Jurists in their derivation of Right from Law,<sup>1</sup> and the inveterate confusion of the

utility, he himself says, 'Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. . . . To the ignorant and bawling fanatics, who stun you with their pether about liberty (!), political or civil liberty seems to be the principal end for which government ought to exist.' *Province of Jurisprudence determined*, 2nd Ed. xxviii.-ix. 242. Hence his remarkable pamphlet, 'A Plea for the Constitution,' in support of the reactionary policy of Lord Grey. Austin had but little of the natural force or reconstructive ardeur of Bentham, and the Titanic assault on the consecrated positions of Blackstone in the celebrated 'Fragment on Government' is but feebly reflected in the verbal vituperation of the 'Lectures.' ('He, Blackstone, owed the popularity of his book to a paltry but effectual artifice, and to a poor superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions, etc. For that rhetorical and prattling manner of his,' etc. etc.) Austin was fortunate in having a pupil like John Stuart Mill, who was able to popularize his name and his school, but his work remained inchoate, crude, and fractional. We may add to the views of the Utilitarian School already quoted, the suggestive summary of Professor Carle: 'Quando poi una teoria qualche essa, penetra in un paese, come l'Inghilterra . . . si può essere certi che quella teoria si cambierà col tempo in una tradizione ritenuta come indigena; finira per destarvi delle affezioni e delle simpatie; e non si arresterà, se prima non avrà ricevuto tutto l'esplicazione di cui può essere capace. Questo appunto accadde nell'Inghilterra quanto alla dottrina dell'utile.' *La vita del diritto*, p. 444.

<sup>1</sup> The notion of 'Right' is really an insoluble *crux* to the Analytical Legists in any consistent application of their utterly external method. 'Law' is dealt with by them as an entirely outward thing, and in

relations of Jurisprudence, must be corrected and overcome if the science is to attain any definiteness of principle, any criterion of progress, or any organic connection with the general movement of thought. And so the whole inquiry into the subject of Natural Right must be taken up anew, and the conception of it as at once anterior and superior to all Positive Law, according to the rational mode of apprehension from Ulpian to Kant, must receive

apparent forgetfulness of the fact—laid down as a self-evident axiom by every profound thinker in jurisprudence from Ulpian and Cicero to Kant and Krause—that all Law is necessarily a product of mind, and owes its universality in its various forms in history to the ever-present working of minds. In cutting off the process of analysis from the essentially subjective origin of the idea of Right, the Analytical School turned their backs upon the source of light, and could only find the shadows of the primary jural conceptions among the external phenomena of Law. Hence their *ὑστερός τρόπερ*. They proceed at the best as a Physiologist would do were he to study the processes of life only in the excretions of the body instead of in the anatomy and relations of the vital organs. Even the term 'Right' is an insuperable difficulty to Austin on account of its universality and independence. Hence his absurd diatribes against Blackstone's method, and the truly philosophical distinctions of the Germans: 'I ought to have remarked that Blackstone has been misled by the double meaning of *jus*; and that hence partly, *his inane talk (worse than any jargon of the Germans)* about the *Rights* of Persons and Things,' etc. (*Lectures*, II. 405) (!). In his despair, he lays the blame of his own confusion of thought upon the fulness of language in expressing the distinctions of thought, and explodes upon the alleged ambiguity of 'Latin, Italian, French, and German.' A more loyal regard to the primary philological rule laid down by the Roman Jurist—'Juri operam daturum prius nosse oportet, unde nomen juris descendat'—would have saved all this and a world of perverted ingenuity besides. The distinction between 'Right' and 'Law' is as fundamental in English as in all the other modern languages (Fr. *droit* and *loi*, Ital. *diritto* and *legge*, Germ. *Recht* and *Gesetz*). So with the Latin *jus* and *lex*, and the Greek *δίκαιος* and *νόμος*. 'Jus' has now been definitely traced to the Sanskrit; but the discussion of the biography of the word would lead us too far away from Austin here. (See, however, the reference at p. 184, *n. infra*; Ahrens' *Cours*, 107, *n.*; Röder's *Rechtsphilosophie*, 55; and Carle's *Vita del diritto*, 87, 111.)

renewed philosophical authentication.<sup>1</sup> But, in the second place, the insufficiency of a merely abstract and universal conception of Right as a scientific basis of Jurisprudence must also be recognised; and the consequent necessity of an organic and systematic development of the whole jural conceptions, in view of the inherent involution of reason in all the social relationships, must be more earnestly undertaken. It will be the enduring merit of the Analytical Jurists to have pointed out the inadequacy of mere subjective abstractions to give vitality and force to the movement of Law, and the negative issues of their own empirical method only point out more clearly the need of a more rational realism. The quickening and fertilizing of scientific reflection in the sphere of Law can therefore only come from the appropriation and

<sup>1</sup> Mr. Herbert Spencer has done good service in castigating the superficial and too popular views that still prevail regarding the doctrines of Natural Right. 'Says Professor Jevons in his work, *The State in relation to Labour*, "The first step must be to rid our minds of the idea that there are any such things in social matters as abstract rights." Of like character is the belief expressed by Mr. Matthew Arnold in his article on copyright: "An author has no natural right to a property in his production. But then neither has he natural right to anything whatever which he may produce or acquire." So, too, I recently read in a weekly journal of high repute, that "to explain once more that there is no such thing as 'natural right' would be a waste of philosophy." And the view expressed in these extracts is commonly uttered by statesmen and lawyers in a way implying that only the unthinking masses hold any other.—'One might have expected,' continues Mr. Spencer, 'that utterances to this effect would have been rendered less dogmatic by the knowledge that a whole school of legists on the Continent maintain a belief diametrically opposed to that maintained by the English School. The idea of *Natur-recht* is the root-idea of German jurisprudence. Now, whatever may be the opinion held respecting German philosophy at large, it cannot be characterized as shallow. A doctrine current among a people distinguished above all others as laborious inquirers, and certainly not to be classed with superficial thinkers, should not be dismissed as though it were nothing more than a popular delusion.' *Op. cit.* p. 87.

application of that organic method of thinking which is now being so fruitfully prosecuted in other departments of science, and which ought to be here specially at home in dealing directly with the concrete realization of the Ideal of Humanity.<sup>1</sup> And, in the third place, the light of the whole historical evolution, as it has realized itself in the sphere of political life, must be brought to bear as far as possible upon the present position and problems of Jurisprudence. This is now so clearly and universally realized in England, that it no longer requires to be urged or dwelt upon. The Science of Jurisprudence will thus find its idea, its purpose, and its completion in a true Philosophy, a living Science, and a reanimated History of Law.

It is on these lines that the best efforts of the present masters of English Jurisprudence are now moving, and they are gratefully and fully acknowledged.<sup>2</sup> But while

<sup>1</sup> Even Professor Holland still describes 'treatises on Naturrecht' as 'Jurisprudence in the air.' But notwithstanding the famous dictum of Jean Paul, it must now be somewhat evident that the Germans are quite in earnest with regard to occupation of the solid land, only they will assert in science the right to the full juristic measure *a cælo usque ad centrum*. The description, if it had ever applicability at all, could only be applied to the abstract systems before Kant, and not to the method of thought which that great thinker originated. Probably Professor Holland will agree with the positions taken up with regard to the doctrine of 'Naturrecht' by Puchta, Friedländer, and Falck; they are the logical development of Kant's system, to which he has the merit of directing appreciative attention in his Text-book; and they are practically assumed or indicated in the most important recent works on the Pandects. If the modern German Jurisprudence is still to be described as 'in the air,' it is so only as the summit of the mountain with its commanding view of all the landscape is in the air, or as the light and heat and the fertilizing elements that stream through or pervade it.

<sup>2</sup> The most important recent Text-books in Jurisprudence are those of Professor Sheldon Amos (*A Systematic View of the Science of Jurisprudence*, 1872; and *The Science of Law*, 1874), Professor Holland (*The*

appreciating their work, and even holding that the special juristic problems in England can only be solved by English methods of thought, we may yet turn to Germany for light and leading in those departments of the science where they are conspicuously available. It is now unnecessary to use the language of apology in doing so, since the soundness, value, and validity of the German methods of thinking have won universal recognition.<sup>1</sup> Professor Sheldon Amos does not use the language of partiality or exaggeration in the extract with which we started, when he says that '*Modern Jurisprudence is emphatically a German creation.*' To give an

*Elements of Jurisprudence*, 3rd Ed. 1886), and Professor Lorimer (*The Institutes of Law, A Treatise of the Principles of Jurisprudence as determined by Nature*, 2nd Ed. 1880). Their respective merits, as the work of jurists of competent faculty and wide erudition, are universally recognised. Professor Amos's principal work is really a Juristic Encyclopædia, displaying a firm grasp of essential relations and vigorous treatment in detail. Professor Holland's work has received the commendations of the most competent critics, and has won a well-deserved popularity as a text-book; but with all its independence and ability, its discussion of principles is somewhat narrowed and obscured by the anxiety to bring details of Roman and English Law into sight. Professor Lorimer keeps more methodically to the universal principles of Jurisprudence, and his elegant and spirited treatise presents, *inter alia*, a learned historical vindication of the principle of Human Autonomy as the foundation of Natural Right, a logical evolution of a rational system of Rights, and an independent exposition of the Sources of Positive Law.—The present work is more elementary in its form and subjects, and it aims at being introductory and auxiliary to the study of any or all of these excellent treatises.

<sup>1</sup> 'There have been of late signs of a change in the mental habit of English Lawyers. Distaste for comprehensive views, and indifference to foreign modes of thought, can no longer be said to be national characteristics. The change is due partly to a revival of the study of Roman Law,' etc. (Professor Holland).—The great progress lately made in the study of the Roman Law is mainly due to the influence of the Historical School of Germany.

introduction to the elements, methods, and forms of that creation is the main purpose of the present effort.

A few words will suffice to indicate the relations of the contents of the following pages, where it is hoped everything is clear and intelligible in itself. 1. Puchta's *Outline of the Science of Right* has been chosen as the simplest, the clearest, and the most pregnant introductory discussion of fundamental principles that is to be found in German. It is the work of a great master who combined the earnest conviction of a high spiritual life with the severe simplicity of scientific truth.<sup>1</sup> Puchta is universally recognised as one of the greatest exponents of the modern scientific Jurisprudence, and he takes rank only next to Savigny himself as a representative of the Historical School. Indeed, the more vital philosophical culture of Puchta, and the wider range of his juristic teaching, as well as his mature art and carefulness in detail, make his exposition a safer and easier guide for the young student than he would find in the bold originality and enterprise of 'the greatest of modern Jurists.'<sup>2</sup>

<sup>1</sup> A short biographical sketch of Puchta's life, with a list of his principal works from the *Conversations-Lexicon*, is appended to this Preface.

<sup>2</sup> Dr. W. Guthrie so designates Savigny, and the designation must be accepted at least as far as the work of Savigny extends. Dr. Guthrie's excellent translation of the Eighth Volume of the *System des heutigen Römischen Rechts* is introduced by an admirable general account of Savigny and his standpoint (*Private International Law, A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*. By Friedrich Carl von Savigny. Translated with Notes, etc. 2nd. Ed. 1880). The First Volume of Savigny's *System* has been translated by Mr. Justice Holloway, late of the High Court of Madras (Madras 1867). Mr. W. H. Rattigan, Fellow of the University of the Punjab, has lately translated the Second Volume of the *System* (*Jural Relations, or the Roman Law of Persons as Subjects of Jural Relations*, London 1884). Another distinguished Anglo-Indian Jurist, Sir E. Perry of the High Court of Bombay, has translated Savigny's *Treatise on Possession*, 6. Ed.

Puchta's *Outline* may be taken as a universalized programme of the Historical School, fitted not only to make Law intelligible in all its manifestations and forms, but capable also of promoting the spirit of independent inquiry and reflection in Jurisprudence. 2. Any want of completeness in the formal treatment of the elements of the science by Puchta—whose regard for the manifold movement of life restrained him from drawing hard intellectual distinctions—is so far supplemented by the concise systematic sketch of Friedländer.<sup>1</sup> They both start from the jural Principle of Kant, but while Puchta found his philosophical element in the vital speculations of Schelling, Friedländer moves in the organic and unified realm of the dialectical thought of Hegel.<sup>2</sup> Yet neither of them obtrudes the ultimate philosophical forms and conceptions of the master thinker; nor is there any real inconsistency in their cardinal conceptions notwithstanding a certain variety in method and expression.<sup>3</sup> 3. Falck's Outlines

1848. Warnkönig's analysis of this work has been translated in Clark's Cabinet Library. Mr. A. Brown has published an Epitome and Analysis of Savigny's *Treatise on Obligations*, 1872. M. Ch. Guenoux has made an excellent translation of the whole of the System into French (Paris 1855).

<sup>1</sup> Friedländer was a Lecturer on Law in the University of Heidelberg in 1847, when he published his Juristic Encyclopædia.

<sup>2</sup> The fundamental principles of Hegel's Philosophy of Right have been ably expounded in English by Dr. Hutchison Stirling in his *Lectures on the Philosophy of Law*. Regard is also given to the Hegelian doctrine by Mr. W. Galbraith Miller in his Lectures on the same subject (1884). A very full and careful exposition of Hegel's political doctrine is given in Italian by Dr. G. Levy, Professor of the Philosophy of Law in the University of Catania (*La Dottrina dello Stato di G. F. G. Hegel, et le altre dottrine intorno allo stesso argomento*, 1884). Reference may also be made to Marrast's *La Philosophie du Droit de Hegel*, Paris 1869.—See Friedländer's account of Schelling and Hegel, *infra*, pp. 264–271.

<sup>3</sup> There will be found some difference in detail between Puchta and

have been more or less known in England since the days of Mr. Austin, and their merits as a practical guide to the study of jurisprudence have been everywhere acknowledged.<sup>1</sup> The student requires not only to know *what* he has to study, but *how* he has to study it, and Falck's guidance as a practical methodologist may be safely relied upon if the experience of Germany may be taken as a criterion. The practical and concrete doctrines of Falck will form a natural transition from the more theoretical study of Right to the more practical examination of Law. Only such portions of Friedländer and Falck as are directly relevant to the study of English Jurisprudence, and supplementary to the *Outline* of Puchta, have been translated.

4. The short sketch of a course of Juristic Study taken from Ahrens<sup>2</sup> is meant to supplement Falck's Outline, and to

Friedländer (as in their views of 'Juristic Right'), but the discovery and consideration of such points may be left to exercise the judgment of the student. One chief object in view has been to furnish material for quickening the habit of independent reflection. It will be understood that the translator does not identify himself with all the views presented in the following pages.

<sup>1</sup> Falck's Outlines (*Encyclopädie*) were edited after the author's death by Professor Ihering (5th Edition 1851). Ihering pays an affectionate tribute to the noble character, the great erudition, and the conscientious lifework of Falck. He was born in the Duchy of Schleswig in 1784; studied Theology as well as Jurisprudence; was called to a professorship at Christiania in 1813, but eventually became Professor in the University of Kiel, where he laboured till his death. Friedländer expresses the judgment universally entertained regarding his *Encyclopædia* (*infra*, p. 272). Austin evidently appreciated Falck's *Encyclopædia*, and carefully studied it. It is referred to several times in the Notes accompanying his *Lectures on Jurisprudence*.

<sup>2</sup> *Juristische Encyclopädie*, Wien 1855. It is only the Appendix to this important work that has been translated. It exhibits the methodological conception of the school of Krause, the most living and hopeful tendency in contemporary Jurisprudence, and so far it supplements the Shellingian and Hegelian aspects of Puchta and Friedländer. It may be

furnish some hints towards the solution of the practical problem of the best methods and subjects of legal teaching. The name of Ahrens, the most distinguished expounder and populariser of the principles of Krause, is now a household word wherever the living spirit of modern Jurisprudence has found a home, and no one has a better right to give the benefit of his insight and experience as a teacher on this subject. 5. Lastly, Friedländer's sketch of the progress of Jurisprudence in the West as a systematic science, is designed to give some completeness to the various parts by indicating the historical development of juristic thought and the wide and fertile fields of Juristic Literature.

These elements, notwithstanding their different origin, constitute a unity in virtue of their relation to the unity of the science. It is their treatment from different points of view of that unity which forms the characteristic method of this little book. That method is briefly the representation of all the rational elements in the science as constituting one systematic whole. Such a method, if legitimately carried out and successfully realized, is not only a convenient guide to the synoptic arrangement and study of the science, but the principal means of giving prominence and certainty to its constituent truths. If the relations of its parts are shown to be real, and are realized

here observed, once for all, that the independent character of the several constituents of this work has been intentionally and advisedly retained in order to secure greater variety and breadth of treatment. It would not have been difficult to have fused the materials here presented into a single sketch, but the student would thus have lost the stimulus and confidence which always spring from immediate contact with the thoughts of acknowledged masters in their own expression. Any additions to the original matter by the translator—mostly of a subordinate and practical nature—are enclosed in square brackets.

in their interconnection, every part of the science thus established will give cohesion and stability to every other part and to the whole. This is what the Germans mean by *Encyclopædia* as a method of science, and even as the highest culminating method of reason, in its ultimate determination of truth. It is this idea which, in its varied application to the different departments and details of empirical knowledge, has been gradually making all knowledge systematic, and uniting it into an organic whole. The conception practically evolved and applied in England by Bacon and later thinkers, has been more methodically dealt with in Germany by her recent masters of thought, and more formally applied by workers in detail to their special sciences. The Encyclopædic Method has thus been systematically applied by the German Jurists to their proper science, and much of their success as comprehensive and original thinkers and investigators has been due to it. In view of that success, and especially of the degree in which they have thus been guarded against one-sidedness and the aberrations of a partial method, it seems more than time that both the name and the reality of 'Juristic Encyclopædia' should be introduced into England.<sup>1</sup>

<sup>1</sup> The common association of an external alphabetical arrangement of the material of knowledge with the term 'Encyclopædia'—as in such well-known works as the *Encyclopædia Britannica*, *Chambers's Encyclopædia*, etc.—is still the chief *idolum fori* in the way of introducing the philosophical conception of 'Encyclopædia.' The conception, however, is rapidly gaining way, and is already almost naturalized in English. The *Encyclopædia Metropolitana or System of Universal Knowledge*, on a Methodological Plan, projected by Samuel Taylor Coleridge, introduced the rational application of the term. It is now familiar in the sphere of theological translations from the German (see Räbiger's *Encyclopædia of Theology*, T. & T. Clark). Professor Lorimer alludes to the want of Juristic Encyclopædia in English Jurisprudence, and hopes to furnish an

Juristic Encyclopædia is not only the proper scientific form of Introduction to the Science of Jurisprudence generally, but it is also the appropriate disciplinary preparation for the systematic study of Positive Law.<sup>1</sup> It stands to it in a relation analogous to that of Mathematics to the Physical Sciences, or of Grammar to the details of the several Languages. It may thus be said to exhibit the definitions, axioms, and forms of proof, or the elements, rules, and relations, involved in all Legal systems. The urgency of its requisiteness and the degree of its availability will depend upon the character and constituents of the particular system under consideration. But it is universally felt and acknowledged that there is no system in relation to which the student so much requires the help and guidance of introductory discipline and conscious method as that of English Law. 'English Law,' says Mr. Frederic Harrison, 'is of all the systems of Law that one which most requires a scientific introduction by a training in principles.'<sup>2</sup> Mr. Austin has also well said: Encyclopædia. The conception of Scientific Encyclopædia is clearly explained in Friedländer's sketch, *infra*, pp. 231-236.

<sup>1</sup> Juristic Encyclopædia is thus taught as the proper methodical introduction to the scientific study of Law in all the German Universities, and in several of the universities in other Continental countries (as in Austria, Holland, Belgium, and Russia). Details are given by MM. Durand and Terrel in their Preface to Professor Lioy's *Philosophie du Droit*. Their careful and unprejudiced estimate of the English system of Legal Education may be quoted. It requires no comment. 'Ce qui caractérise l'enseignement anglais, c'est donc son caractère pratique. Si l'on peut louer justement l'organisation du barreau anglais, on ne saurait condamner trop énergiquement ce défaut d'études théoriques. Cette éducation peut faire de bons avocats et même de bons magistrats, mais elle ne saurait créer de véritables savants qui fassent avancer la science du droit.' *Préface*, cxxvii.

<sup>2</sup> *Fortnightly Review*, vol. xxv. 126. Mr. Harrison goes on to say: 'A scientific Jurisprudence is not now an intellectual luxury, but a practical necessity, for an English Lawyer,' p. 130.

'To the student who begins the study of the English Law without some previous knowledge of the *rationale* of Law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of Jurisprudence, and with the map of a body of Law distinctly impressed upon his mind, he might obtain a clear conception of it as a system or organic whole, with comparative ease and rapidity.'<sup>1</sup> In like manner, Mr. Phillips, in his able and independent discussion of Jurisprudence, says: 'I firmly believe that the intolerable aridity usually attributed to legal study is entirely due to the infatuation with which the student usually persists in exploring the details of his science before he comprehends its outlines. . . . What every Jurist has first to do is to make himself master, not of the Law itself, which may be pernicious and must be imperfect, but of that great system of Jural problems which forms the framework of all Law, and which, as it arises out of the conditions of human existence, must retain its importance while the human race survives. Let him once clearly perceive how these questions have become necessary and how they are connected with each other, and he will have little difficulty in understanding and criticizing the various solutions of which they are capable. Let him once thoroughly comprehend what is *to be* done, and the inquiry how it *has been* done will become an easy one.'<sup>2</sup> Let one more quotation, embodying the authority of Professor Sheldon Amos, describe in his own vigorous and graphic language the general perplexity and confusion of the young student of English Law, arising from the lack of clear scientific guidance. 'It cannot be

<sup>1</sup> *Lectures*, iii. 362.

<sup>2</sup> *Jurisprudence*, 26-7.

surprising,' he says, 'if the young English student approaches the Science of Jurisprudence with somewhat of a quivering heart and trembling gait. He knows not where he is going, and is not quite sure whether he is going, or wanting to go, anywhere. He thirsts for something broader, deeper, more indestructible, than anything he can find in Text-books of English Law, or in the successive modifications in the substance of Law itself. He hears of "Jurisprudence," and he has a dim hope that what he is in search of may perchance be there. He draws near, and, in place of a Science, or a systematic exhibition of what is Universal and Everlasting, he is often enough regaled with nothing more satisfactory than the story of incessant change, the dreary register of meaningless Variety, the loose guesses of Politicians and Moralists, the reckless verbiage of those who have studied just Law enough to confuse the spontaneous workings of their conscience, and yet who affect just sensitiveness enough of conscience to interfere with their unflinching interpretation of a single Law.'<sup>1</sup> To all this nothing further need be added to justify an attempt to meet such a crying practical want, and to remedy in some measure such deplorable unscientific confusion. It is confidently claimed for the following pages, notwithstanding their foreign origin, that the simplicity, comprehensiveness, and vitality of the scientific conceptions they present are fitted not only to guide the student along the great open highway of Jurisprudence, but to conduct him intelligently to all the special fields of Law—English, Scottish, American, or however named—that he may desire to reach and to cultivate.<sup>2</sup>

<sup>1</sup> *A Systematic View of the Science of Jurisprudence*, p. 508.

<sup>2</sup> As a further introductory aid to the study of English Law, this work

This little book is accordingly presented as an elementary contribution to the encyclopædic treatment of Jurisprudence as a science, and as an introduction to all Legal Study. Its merits are wholly due to the classical and accomplished authors whose thoughts it represents; and the endeavour to make them current in the English tongue will be more than repaid, if they contribute to the further realization of the wish of the distinguished French Historian of Jurisprudence, when he exclaimed, in view of the slumber of his science in England more than fifty years ago: 'Puisse le droit renaître avec vigueur dans la Grande - Bretagne, cette terre des légistes et de la légalité !'

W. H.

OCTOBER 25, 1887.

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## PUCHTA.

### BIOGRAPHICAL AND BIBLIOGRAPHICAL NOTE.

GEORG FRIEDRICH PUCHTA, a very distinguished academic teacher and writer on Jurisprudence, was born at Cadolzburg, in Franken, on the 31st August 1798. He received his education at the Gymnasium of Nürnberg, which was then under the superintendence of Hegel. In 1816 he became a Student of the University of Erlangen, where he graduated in 1820, and began to lecture (as a University Private Lecturer) on Jurisprudence. He applied the energy of his active scientific mind mainly to the Roman Law, but he also included the subjects of Juristic Encyclopædia and Ecclesiastical Law in the circle of his Lectures. In 1823 he received a call to

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will be shortly followed by a translation of Professor Brunner's *History of the Sources of the Law of England*, as contained in Dr. von Holtzendorff's *Encyclopædie der Rechtswissenschaft* (see pp. 276-7, *infra*). Professor Brunner's admirable outline of the Juristic Literature of England will be found to form an attractive and instructive means of passing from the study of General Jurisprudence to that of the special System of the English Law.

Dorpat, and in consequence became a 'Professor extraordinarius.' In 1828 he was appointed to a Professorship at Munich, where he entered into friendly relations with Schelling. In 1835 he was called to Marburg, in 1837 to Leipsic, and in 1842 to Berlin as the successor of Savigny. In 1844 he was nominated a Privy Councillor of the Supreme Court, and in 1845 he was appointed a Member of the State-Council and of the Legislation-Commission ; but he died on the 8th January 1846.

Puchta's method as a Jurist may be properly designated as the historical method ; he was able to follow a given system of Law into its inmost thoughts, and to exhibit it as a spiritual and living unity. He possessed solid philosophical culture, and belonged to the School of Schelling. With this he combined a rare acuteness and clearness of thought and expression ; and in these respects his Lectures, and especially his later writings, are regarded as models. In the department of Ecclesiastical Law, he followed a strict tendency which he also carried out in life, and which, in conjunction with the severity of his criticism, drew upon him the attacks of many opponents.

The most important of his works are the following :—'Grundriss zu Vorlesungen über juristische Encyklopädie und Methodologie' (Erlangen 1822) ; 'Civilistische Abhandlungen,' Bd. i. (Berlin 1823) ; 'Encyklopädie als Einleitung zu Institutionen-Vorlesungen' (Berlin 1825) ; 'Das Gewohnheitsrecht' (2 Bde., Erlangen 1828-37) ; 'Lehrbuch für Institutionen-Vorlesungen' (Münch. 1829) ; 'System des gemeinen Civilrechts, zum Gebrauch bei Pandekten-Vorlesungen' (Münch. 1832) ; 'Lehrbuch der Pandekten' (Leipz. 1838) ; 'Einleitung in das Recht der Kirche' (Leipz. 1840) ; and 'Cursus der Institutionen' (2 Bde., Leipz. 1841-42).—*Conversations-Lexicon.*

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P A R T I.

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OUTLINES OF JURISPRUDENCE

AS

THE SCIENCE OF RIGHT.

A JURISTIC ENCYCLOPEDIA.

BY

G. F. PUCHTA.

Translated from the German.



## Chapter First.

### FUNDAMENTAL PHILOSOPHICAL PRINCIPLES.

—o—

#### A.—THE PRINCIPLE OF FREEDOM.

##### 1. Nature, Spirit, Reason, Freedom.

IN man we distinguish two sides. On the one side he belongs to nature, and is a natural being like the other creatures. In this connection he is only the most perfect of animals, and like all other creatures he is subject to the necessity of nature. This law is not imposed on the external and visible body only; the invisible and inner being of man is also subjected to its influence. Man thus possesses his body and his soul, with their essential qualities and powers, not from choice of his own, but as facts independent of his personal determination, and they are so far necessary to him.

On the other side, man is a spiritual being. He is distinguished above all other creatures by having the possibility given to him of determining himself to something. He has a will, a choice. This possibility constitutes the freedom of man. In his spirit and the freedom implanted in it, consists the resemblance of man

to God :—a resemblance attributed to man in the very oldest of our sacred Scriptures.

Man by his freedom resembles God, but his freedom is not the same in its character as that of God. God is pure spirit, perfect freedom. Man, while free, is at the same time a creature, a natural being. He has a finite freedom that is limited in itself and restrained by physical necessity.

[The faculty which connects the spiritual and the natural side of man, is Reason.] It is the faculty by which we know what is necessary. Reason is an indispensable good for the nature of man as a being subject to the necessity of nature. It is to man what instinct is to the lower animals ; it guides him through the dangers that surround him in the powers of nature which have become hostile to him, and under which he would fall a victim without this faculty. We move through the world of nature as in the midst of some powerfully driven machinery whose iron teeth and pinions threaten to seize and crush the unwary. Man lives in constant conflict with heat and cold, with fire and storm, with the resisting earth and its creatures, even with his own flesh and blood, and the very impulses of his soul. And Reason is given as the weapon to be used by him in this conflict.

[But it would be erroneous to regard Reason as the chief Good. Man has it only on account of his imperfection. A higher good is given in the Spirit with its faculty of Freedom.] Hence we do not ascribe the operations of Reasoning to God. For God there is no necessity laid down ; what is necessary becomes, in relation to Him, a free act of His Spirit. And, on the other hand, we rightly deny Reason to the lower animals. But this

holds only because they are mere creatures of nature, whereas man is not merged in natural necessity, but has at the same time a spiritual being superior to it. Hence, of all the creatures, Man alone is able to know and understand Nature.

## 2. Freedom the foundation of Right.

Freedom is the foundation of Right, which is the essential principle of all Law. Hence it follows that it is not from the notion of Reason that we get to Right as the principle of Law. And this is confirmed by the experience presented in the attempts of philosophers to found Right upon Reason.

These attempts enjoy a certain popularity with those who are accustomed to put Reason above all other human powers. They are satisfied at seeing themselves thus raised above the lower animals, and they are not inclined to plant their foot upon the ladder which leads to still higher regions. They are wont to connect everything which appears as an essential prerogative in man, with Reason as their highest good. Thus it has come about that the Good has been identified with the Rational, and the irrational with the bad ; and Reason, likewise, has been regarded as the principle of Freedom. But there is a contradiction involved in this view. For if the bad, as evil, be the irrational, then freedom, which includes the possibility of evil, cannot be deduced from Reason, which of itself excludes evil ; and conversely. It would be much more in accordance with Reason that the good should be realized of necessity ; whereas that it comes through Freedom, which does not exclude the possibility of evil, is contrary to mere Reason. Reason is therefore

not the principle of Freedom, but is rather an element in human nature antagonistic to freedom ; and it has shown itself to be such from the beginning.

Only what is necessary is rational. A philosophy, therefore, like the Hegelian, which gives itself out exclusively as 'the investigation of the rational,' must of itself renounce the investigation and establishment of freedom. And if, in order to save its claim to universality, it draws everything real into the circle of the rational,—according to Hegel's celebrated proposition that 'what is rational is real, and what is real is rational,'—in the necessity of the alleged relation we are robbed of freedom as it is thus virtually declared to be unreal. What is affirmed of the real, in this famous phrase, holds only of the natural and physical and not of the supernatural and spiritual ; and even the natural, so far as it has a relation to the supernatural, cannot be properly called merely rational. The higher relation is the side of nature that is turned to the eye of God, to whom, as already stated, even necessity must appear as freedom. At first, at his creation, man was put into this free central sphere. Only when he had fallen from it did necessity as such appear, and only then did the exercise of Reason begin,—a high gift certainly, and indispensable to the fallen nature. But at the best it is one-sided in its applications, and even prejudicial to the spiritual nature of man, if it obtains sole sovereignty by occupying the place which belongs only to that supreme wisdom which embodies the harmony of necessity and freedom. The philosophers who derive Right as the principle of Law from Reason, thus remain outside of its whole sphere, and at best they only reach the subject of Right *per saltum*, or by an illogical transition.

In order to attain to the principle of Right, we must start from the spiritual side of man. Do we then deny that Reason is involved in Right and Law? By no means. But we have indicated that there is a limitation imposed on the Spirit of man by his modification as a natural being. Man must observe this limitation, and Reason enables him to recognise and understand it. The human spirit, in attempting to renounce Reason, falls into folly. In order that the freedom of man may truly exist, it has to be rational, that is, it has to maintain itself within the limits of human nature. Right is therefore rational; and this is the point of view from which Rights and Laws may be apprehended as a system, and represented as forming an organism of kinds and species. But this is only one side of Right, starting from which alone we would never attain to the other side, which is Freedom. And it is in Freedom that the germ of Right and Law lies.

### 3. Nature, Limits, and Definition of Freedom.

The general idea of Freedom is 'the capability of determining oneself to something.' Two elements may be distinguished in the faculty of freedom: (1) the choice between different possibilities presented to the mind, and (2) the will as the direction of the mind upon the object of choice. The two, however, constitute only one act, viewed from different sides; and, thus, we may define Freedom as the possibility of a choice or of an act of will.]

We have found that there is a limit to the Freedom of man in his quality as a natural being. His Freedom is therefore finite. This limitation is imposed by some-

thing lying outside of Freedom, and not by itself ; it is an external limitation. Man recognises it by means of his Reason. Hence his Will is irrational if it strive to break through this limit by directing itself to something naturally impossible, whether the attainment of the object of choice is debarred by the nature of the body or of the soul. But as this limitation is external to Freedom in its origin, the faculty itself is not thereby modified in its own inner nature. Inwardly it is yet unlimited ; and as its essential nature is not determined by the mere external limitation, it would be infinite within itself were it not otherwise bounded. It is not correct, then, to call this external limit a limitation of Freedom itself, just as it would be incorrect to deny that an absolute ruler is unlimited merely because his authority does not extend beyond the boundary of his own territory, or to hold that another was more unlimited merely because he ruled over a country of larger extent. This observation is not superfluous, because Reason is not unfrequently regarded as a modification of Freedom, and its character then defined as consisting of the quality of rational freedom.

The contents or constitutive elements of human Freedom are, however, not determined by natural necessity, which is opposed to it as an external limitation ; and, therefore, they are not exhibited by Reason. They are determined by the existence of a Divine will. The relation of human freedom to the infinite freedom and omnipotence of God, is the ground or source of the constituent contents of human freedom.

This relation is to be taken along with the fact that man is not pure spirit, but is at the same time a natural being. And in consequence there arises a natural necessity opposed to his freedom, while this necessity,

however, gives no real contents to his freedom. The freedom of man receives its proper content or ground of determination from the fact that there exists a Being above him who is pure spirit and perfect freedom, who is not bound by the necessity of nature, to whom nature itself is only a form of His free will, and who, in a word, is omnipotent. It is thus primarily through the existence of God that human freedom receives its inherent ground of determination. It would be absorbed by the infinite freedom of God but for the relation between them, according to which the freedom of man is subject to the determinations of the divine freedom.

The nature of this relation establishes more particularly the definition of human Freedom. Freedom has not been given to man that his will should have its end and standard of action in itself. Had such been the case, his freedom would have been inwardly unlimited, and man would have been as God, only with the difference of the external limitation of nature ; he would have been a god like those of whom Isaiah says, 'They are vanity, and profitable for nothing,' or as Elijah said of Baal, 'Either he is talking, or he is pursuing, or he is on a journey, or peradventure he sleepeth, and must be awaked.' This is the freedom of which the Atheists dream ; an infinite power in an earthen vessel, a colossus of brass on a pedestal of clay. But man has freedom in order that by his free determinations he may do the will of God. The will of God has to be realized. The other creatures are driven to do so by a natural necessity, but man ought to be subject and obedient by his will to the will of his Creator. In his obedience to God lies his real freedom. The freedom of man does not consist in his having no

superior over him, but in that he has himself the power voluntarily to subject himself to a superior as his supreme Lord, so that this subjection of himself under the higher Will is not an act of external necessity, but of his own voluntary obedience.

The constituent power in human freedom is, therefore, the capability of choosing either to subject oneself to the sovereignty of God, that is, to become voluntarily a servant of God, or, in a life without God, to follow the pleasures of the world and 'the lusts of the heart,' which is to become a servant of sin. In other words, it is either to walk in the light of the spirit of God, which is really the true freedom, or to live in the darkness of nature, which is the false freedom. When man chooses the second of these, he does not thereby escape from the omnipotence of God which hems him round. Even should he take 'the wings of the morning,' he could not fly to where he would be beyond the Divine power, for he is subjected to it like the rest of the creatures, but he only has the prerogative of self-determination, under the threatening of judgment, in case of his abuse of the Divine gift of freedom.

The proper definition of human Freedom therefore is, that it is 'the power of choosing between good and evil.'

## B.—THE PRINCIPLE OF RIGHT.

### 4. Jural and Moral Freedom.

In virtue of freedom, man is the subject of Right and Law. His freedom is the foundation of Right, and all real relations of Right emanate from it. Hence in the oldest Scripture we possess, the capacity in man for what

is right is connected with his resemblance to God: 'Let us make man in our image, after our likeness; and let them have dominion . . . upon the earth.' In the legal rights of all nations, freedom more or less visibly and really occupies this place. The character of this legal or jural freedom has now to be more precisely determined.

Man is the subject of Right because of his capability of determining himself, or, in other words, just because he has a will. It is not by antecedent use of his freedom, in a way pleasing to God, that he becomes invested with Rights, nor by first resolving for what is good and for obedience to God. Here lies the difference between Right and Morality. The latter is not constituted by the mere possibility of choice; man is not moral merely because he has the power of will. Morality is founded upon actual determination and resolution; an individual only becomes the subject of morality by his own voluntary acts. Man attains to moral freedom only by deciding for the good; and thus freeing himself from the supremacy of evil, although still, it may be, involved in the struggle with it. This struggle with evil, which implies in the very act of conflict a certain liberation from it, is the field of moral activity. On the other hand, man is jurally free from the outset, whatever choice he may make; the sinner is as legally free as the righteous man, because this quality belongs to him in virtue of his mere power of choice. It is not decision itself, but the possibility of decision, that constitutes the basis of Right and Law. Moral freedom is freedom from the slavery of sin; jural freedom is the possibility of an act of will as such.

This distinction is indicated in the history of the

Creation of man and his fall, already referred to. Legal Right was given to man in dominion over the earth before the decision by which he fell, and it was not lost by the fall nor withdrawn. This decision only sundered the jural power and its real exercise, separating Right and fact. As it put man into conflict with nature, from which he must now wrest what belongs to him by right, but what it no longer freely yields, and as legal and actual dominion in respect of nature is thus separated, a violation of right or a condition of unrightness, consisting of the severance of the actual and jural power in man, was thereby produced. Right itself thus preceded the Fall, and had a more perfect existence before it than after, as man's legal right of dominion was then uninterrupted combined with actual dominion.

In thus founding Right upon the possibility of an act of will, the essential principle of Right is indicated as that of Equality. Right implies the recognition of Freedom as belonging equally to all men as subjects of the power of will. It receives its material and contents from the impulse of man to refer to himself what exists out of himself. The function of Right, as manifested in Law, is to apply the principle of equality to the relations which arise from the operation of this impulse.

### 5. The Manifestation of Jural Freedom.

We have seen that Right has regard to the will not in its decision for good or evil, but in respect of the mere act of willing, as a potentiality, as a power. How then does this jural will express itself? How is the principle of Right exhibited in action?

The outward expression or manifestation of Right will

manifestly be such that the inner decision for good or evil may be left out of account; the resolution or act will be a jural fact, whether it be for good or for evil. As jural freedom is only the possibility of an act of choice, its expression must also of itself be indifferent to other relations. An act is not of itself jurally right because it is moral, nor jurally wrong just because it is not moral.

Jural freedom expresses itself actually (1) in the *Persons* to whom it belongs, and it thus becomes ascribed to the subject whose possibility of willing is thereby jurally recognised. Here then we have a personal relation, indifferent so far to the special moral qualities of the act itself. According to the strict notion of Right, a fact is equally jural, whether the person acting is a good or a bad man; the one is as much a subject of Right as the other, for both are equally subjects of will. Good and bad are predicates of the individual, and not of the Jural Person which is the subject of Right.

Again, Jural Freedom expresses itself (2) *in the Activity of the persons as such*. This activity is made up of acts of will, not considered in their determinations for good or evil, but as mere acts of a personal power. The relation of the will, as a power, to an object is shown in the subjection of the object, resulting in the dominion of the will over it. But in this dominion, in which the jural freedom as the principle of Right is exhibited, there is no question of its moral qualifications. The legal Right to a thing, which we call Property, must be recognised, even if the possessor makes a morally bad use of it, and although it might find in the hands of another an application much more conducive to human well-being.

## 6. The Conception and Meanings of Right.

Right is consequently the recognition of that Jural Freedom which is externalized and exhibited in persons and their acts of will and their influence upon objects. Right is itself a form or condition of Will, primarily in God and then in the whole of mankind. Men are bound together by the principle of Right, as a power of will which is directed to the recognition of persons, and of their acts of will as such.

A twofold jural will is here indicated: the Will of the whole community of society and the Will of the individual, which is recognised by the former so far as the two correspond. The word 'Right' is used of both, and this twofold application has to be observed.

1. We use the word 'Right' for the universal or common will, which is the will of the community as a whole, that enacts an express Law of legal freedom, or recognises a regulation or prescription laid down as jural. Right appears here as a legal injunction; that is, as a rule or maxim of Right, or as the whole of a series of such rules or maxims. These principles or maxims of Right constitute the foundation and essence of the legal Rights of a people, and they accumulate and gather into certain masses, according to the relations which they determine. Such masses of recognised precepts, form the institutional principles of Right. Thus Property is an institution of Right when viewed in relation to the mass of jural prescriptions which affect it. Right, as a whole, thus consists of general institutions of Right, and these again of particular propositions of right.

2. The word 'Right' is also used for the will of the individual, so far as it corresponds to the will of the

community as a whole; and for the power, control, or title thus given to some person over an object. Such a Right as pertaining to a person, may be resolved into certain particular warrants or grounds of Right included in it. Thus, in the Right of complete power over a thing which corresponds to the idea of property, there is involved the title to possess the thing, to exclusive use of it, etc. Here, again, Rights gather in the sphere of fact into complexes, which are called Relations of Right. To say that Persons stand in relationships of Right, means that they have entered into jural or legal relations to one another; and this arises from the fact that the Rights which pertain to them, have obtained a connection with each other in the Persons embraced in the relationship.

In connection with this second meaning of Right, three related conceptions have emerged: (1) Title or warrant, (2) Right as power, and (3) Relation of Right. It may be here observed, in passing, that the conception of Right as 'power over an object' is the only perfectly definite conception of the three. The Titles which such a Right includes, only obtain thereby determination, as they have by themselves no precisely cognizable character. Thus the title, authority, or warrant to use a thing, or to possess it, and therefore to demand it from another, or to refuse it to him, appears as the condition or constituent of very different rights, and may thus receive a very different character. Formerly the tendency prevailed to split up Rights into their warrants or titles, and thus to disregard the conception of Right itself.<sup>1</sup> Lately the other extreme has been followed, and the notion of the

<sup>1</sup> An example is presented in the definition of Property given, among others, by Mühlenbruch, as 'the Right to possess a thing, to use it, to dispose of it in any way, and to vindicate it from every possessor'!

Relations of Right, on account of its apparent compactness, has been adopted as the basis of the theory of Right. It will be shown afterwards (§ 21, 22) how far the Jural Relations are capable of definite comprehension and reduction to a system; but beyond a certain limit they become lost in the accidental and infinite formations arising out of the living intercourse of society. In such circumstances, the business of the jurist just consists in singling out and disentangling those Rights which have thus become involved in the confused mass that cannot be followed by the non-juristic eye, and in determining the rightful value of any particular jural relation.

The two meanings of the word 'Right,' which have now been explained, are usually distinguished by calling the first the *objective* and the second the *subjective* meaning of Right. Jural positions and laws are thus equivalent to Right in the objective sense, and legal powers or titles to Right in the subjective sense. These expressions are not well chosen. Above all, they want clearness; and if this necessary want is supposed to be supplied by the explanation that in the first sense man is viewed as the object, and in the second as the subject of Right, this only brings out the incorrectness of the distinction more clearly. For, Right, taken in the first meaning, as a universal will or the common will of a community, is still the will of man, and has man as its subject; and, on the other hand, man may be the object of a right of dominion or power, as in the second meaning. This inadequate mode of designation should therefore be given up. The relation of the two conceptions—the recognised principle of Right and jural Power of right—may be expressed by saying that the former is the antecedent condition of the latter, and the latter arises out of the former.

### 7. Relation of Right to Morality.

The relation of Right to Morality has been already touched upon. It follows from what has been indicated on this subject, that the jural and the moral view of a relation, when one of them is set up as exclusively valid, must assume a hostile attitude towards each other. As a mere Right would ignore whether a decision is for the good or the bad, so would Morality ignore any claim of the will as resting on mere power. This point is scientifically and practically so important for the doctrine of Right, that we cannot avoid some closer consideration of it. The conflict between the principle of Right and that of Morality disturbs the minds of individuals, and it has already occasioned the most pernicious disorders in States. The spirit of revolt against the order of Right in general, and not merely against certain particular institutions, and the struggle around property which has emerged from time to time, and is moving in pronounced forms at present, have all originated from this relation. The task imposed upon the function of Right in order to deal with this conflict, will be afterwards considered (§ 8, 9); here the subject will be looked at from the standpoint of Morals.

As experience shows that an imperfect apprehension of moral principles, or a practically perverse moral culture, has led to a hostile sentiment towards legal Right, so it is just the recognition of the true nature of the moral principle that can compose this discord. The possibility of choice is certainly not enough to satisfy the moral criterion, as it is only the prerequisite of moral decision. Choice is, indeed, only of consequence to morality in the practical act of decision. But as

morality regards voluntary decision not as an act finished once for all, but as a continuing process repeating itself and changeable,—since there may be a fall into evil and a return to good,—the possibility of decision becomes to it an element of lasting importance. It cannot therefore take a position of antagonism to the principle of the legal equality of Persons as founded on Right, since it rather itself establishes such an equality by recognising it as the element upon which its own principle rests, and as continually at work in its own sphere. Even in the sinner the Moral judgment recognises the possibility of an act of will in conversion, and does not inculcate merely the love of the righteous. Morality thus goes along with the principle of Right so far as Right goes; but it also goes farther.

A hostile relation could therefore only arise between Right and Morals, if the principle of Right formed a hindrance to Morality advancing from the point which is common to them, that is, from possible to actual decision in moral action. But this is not the case. It is prevented by the fact that the immediate activity and movement of the principles of Legal Right and Moral Conduct, fall into two different spheres, the former being embodied in the external relations of persons, the latter in the inner sentiment and disposition of the individual. If, then, a certain relation is recognised as legal and protected by Right, while it may be thought that morally it ought to be ordered otherwise,—such as the act of protecting in the possession of his property one who makes an immoral use of it,—this condition is not of itself an infringement or restraint of morality, because the external relations are of themselves indifferent to the principles operating in this sphere, the moral power

lying in the inner disposition and not in the outward means of the individual. The poor widow who throws in her mite is not less benevolent than the rich man who contributes a large sum in the same relation; just as he who hates his brother is morally viewed as being in intent as much a murderer as one who takes away his life. And as external relations do not prevent the fulfilment of the moral commandments, neither can they procure their fulfilment. ‘Though I bestow all my goods to feed the poor, and though I give my body to be burned, and have not charity, it profiteth me nothing.’

The war of annihilation against legal Right, when waged from the standpoint of moral principle, is at the best a transference of the latter to a sphere that is foreign to it. This movement is founded either upon mere narrowness of apprehension and knowledge, or upon a certain affectation and hypocrisy which have a pronounced and dangerous influence in the political questions of the time. Any one who desires to have his share in the goods of the earth,—such as property in land,—may found his claim upon the theory that in the person of the first man dominion over the earth was also given to him, but he ought at the same time to admit that this is at most only a principle of Right and not a moral regulation, and in pursuing his end he ought to follow the path which the law of Right lays open to him. If he founds upon a supposed morality which is antagonistic to the principle of Right in property, while his professed morality at the same time proclaims external goods to be mere chaff, if not even a rock of offence, he is little better than a fool or a hypocrite, who under a thin disguise burns within from the covetous desire of the

very idol which he attacks, because it is in the possession of others.

### C.—DEVELOPMENT OF RIGHT AS THE PRINCIPLE OF LAW IN HISTORY.

#### 8. The function of Right as a principle of Equality.

The Principle of Right has been bestowed upon man as a spiritual element inherent in his constitution. From the beginning it has been one of the essential bonds which have bound men together, and determined their earthly relationships.

The individual things which fill the world would, without some preserving bond, wear out and destroy each other. In the domain of nature, the genera and species embodied in it, form such a bond, and they thus preserve its natural inequalities in order. Everything in nature is individual and different; and, as such, one object is unlike, and consequently unequal to the other, in different degrees of inequality according to their stage of being. The higher an object stands on the scale of the creation, so much the more complete does its individuality appear. But every such object is subject to the law of its species and kind; and as such, a certain degeneration—which may be compared to the power of sin in the sphere of spirit—corrupts the individual formation and destroys it. We observe in nature a powerful striving after individualization, and consequently after inequality in individual forms. This striving, however, is limited by the law of 'each after his kind,' and it only breaks through betimes as if by way of a transgression of that law, or in violation of the original order.

In the sphere of mind there are also spiritual bonds, corresponding to these laws of nature, which are destined to hold the different individualities of the spiritual kind together. Thus in the spirit of man, as modified by its connection with nature, the same sort of impulse drives him towards dividing and separating himself from his fellow-men as co-existing individuals ; and it leads, when uncontrolled, to pride, selfishness, and hatred. By this impulse, the differences manifested in human relations are unfolded and intensified, and they therefore need a combining bond, that they may not dissolve into what Hobbes calls a ' bellum omnium contra omnes.'

[On this account two guides have been given to man, by which that tendency to individualistic separation is guided and controlled rather than suppressed. The one is Love, which awakens the sentiment of devotion and surrender, the very opposite of the impulse of egoism, and stimulates the individual to assimilate himself to others.] It has therefore been said of it, in contrast to those lower outgrowths of the spiritual life, 'it is not puffed up, doth not behave itself unseemly, seeketh not her own, is not easily provoked.' On the foundation of this Love, rest the natural unions and associations of men in society. These include Marriage and the Family, as the product of family love, the People united by the principle of patriotism or Love of Country, and the Community of all mankind, to which universal Philanthropy leads. Above all these stands Love to God, the true source and end of all Love.

[The second guide is the SENSE OF RIGHT. This sense is likewise destined to guard the condition of Equality among men, by reducing their individual inequalities under that which belongs equally to all, namely, Per-

sonality as the possible will of all, and by thus setting limits to the impulse and tendency of the individual to refer and subject others to himself. This function of equalization, is effectuated by the individual being led to recognise others as possessing rights like his own.

Upon the natural inequalities of men and their mutual relations, rests the manifoldness of Right. These inequalities present the material which Right has to master and reduce to harmony. In this process the form of Right is reacted upon, and variety is introduced into its manifestations. Right brings into prominence the personality of man, and it recognises the diverseness of personality. It overcomes the differences among men, not by negating or effacing them, but by constituting them into differences of Persons, and thus controlling them. According to the principle of Right, Man as an individual is a Person; and he is so, too, as the member of a Family, as the member of a Church, and as the member of a Nation. But there exists a difference in the modes of Right among these personalities. The jural Relations are different according to the position of the person, and thus there arises a variety of jural Institutions. In the activity or practical action of persons, Right lays stress upon the fact that this activity is mainly a subjection of objects to the will, as the ground of dominion over them; and this dominion or power is different according to its objects. There thus arise variety and multiplicity in the Rights which men can acquire, as Property, Claims, or Powers.

Thus the march of Right trends towards an Equality, which gives to the merely jural view of things a hard and cold aspect, and it appears lifeless to the impressional phantasy and the pleasing play of the feelings. The

many-sidedness of human nature, is contracted in the sphere of Right into the colourless conception that only represents what Person involves. It makes all the riches of external nature shrink into the equalizing conception of mere Things, and the ideas of 'Claim' and 'Obligation' suffice for the representation of the whole infinitely varied intercourse of men in society. Yet the value of Right ought to be judged by its fruits. Beneath this cold and apparently insensible covering, there stirs and moves the warm life of humanity in all its fulness and variety, not really checked and suppressed, but furthered and protected. What appears to the quick overflowing feeling as a robbing of the manifold richness of existence, is in reality the very condition which prevents the destruction of all Individuality. The order of Right may be compared to the understanding, which in the luxuriant entanglement of the forest arranges and clears the trees and shrubs that threaten to suffocate each other: a process which, with all its importance, is apt to excite a certain childish repugnance against its own activity.

### 9. Justice and Equity. The Historical Development. Ancient and Modern Right.

The historical development of Right rests upon a twofold task which it has to discharge. 1. On the one side, it has to attain to supremacy and dominion over what is unequal and individual in man, and it must not be controlled by these. It is only when this has been attained that the notion of Right appears in its purity. Personality, as the element equally belonging to all men, is then apprehended as the foundation of the principle of

Right, and brought into practical activity; and all the natural differences of Individuals, are subordinated to this principle of equality and recognised as controlled by it.

2. On the other side, the Individual is also to be secured in the possession and enjoyment of his rights; and the forms of Right have to be determined according to the material facts of varied individual conditions, without prejudice to the purity of the notion of Right. The institutions of Right are, therefore, to be so fashioned by law that they may correspond to the existing individual requirements.—We may call Right from the first point of view, 'strict Right' or rigid Justice; and from the second point of view 'equitable Right' or Equity.

The idea of Right has been only gradually unfolded in the course of time with the history of man. The rise of the Peoples, forms a turning-point in the history of Right. Before that period, mankind was divided merely into Families, between which no bond of Right yet existed. In the separate Families, the sense of general Right was still suppressed by the preponderance of that personal Love upon which the family rests.<sup>1</sup> When the time was come, there arose another Union which occupied a position between the Family and Mankind at large. This was the People as a community, held together by common descent, language, and location. The members

<sup>1</sup> A trace of this view is found in what the Roman Jurists say of the 'jus naturale,' as a division of Right different from the 'jus gentium' and 'jus civile.' (*Inst. L. 1, § 3; L. 4, 5, D. De just. et jure, i. 1.*) They mean by the 'jus naturale,' Right prior to the rise of the peoples,—the Right of Men not regarded as members of a nation. They include in it particularly the relations of the Family according to its natural foundations, and therefore viewed apart from its special developments among the various peoples. Hence they also say that *jure naturali* all men are

of the People are also bound together by a principle of Love, without which indeed no natural society is conceivable ; but this is distinguished from mere personal love, as the love of Home and of Country. This love, indeed, embraces the associates of the home, but not in their individual relations merely ; it regards them as fellow-countrymen, and admits otherwise of a relation of indifference towards their individuality. When we are moved by the Love of our country and people, an individual of foreign origin may even appear to us as standing closer in all individual relations than a countryman. In the place of love of the Individual, as such,—which is antagonistic to the pure development of the consciousness of Right,—there arises among the People in connection with their common relations as countrymen, the principle of the recognition and respect of the human Person as the subject of Will ; and the idea of relations of Right, then springs up freely and shoots forth with vigour. The authority upon which order in the Family rests, is represented in the head of the Family, whose commands the members of the family receive with loving reverence. The People have no natural Head ; and hence the order of Right here assumes form, instituting a magisterial head or authority by which this order is maintained. Thus it is only among the peoples that Right comes into a position which makes its pure

free, for the absence of freedom arose from the wars between the different peoples ; and to this they refer their deviations from the rigid view that Slaves were to be treated entirely as Things. (L. 64, D. de cond. jud. 12, 6.) The ‘*jus naturale*’ is in their doctrine, the Right to which men were impelled by a sort of natural instinct which in a certain way works also upon the lower animals. ‘*Jus naturale est quod natura*’—not naturalis *ratio*—‘*omnia animalia docuit.*’ It rests upon an obscure impulse, and not upon full consciousness.

development possible. And hence it is only with the Peoples that the proper history of Right begins.<sup>1</sup>

The Peoples are themselves to be regarded as different individualities, dissimilar and unequal in nature and tendency. This individuality forms what we call the national or popular character. Hence the Rights of peoples are different; and the peculiar characteristics of a nation are exhibited in its System of Right, just as in its Language and Customs. The difference between systems of Right is either *contemporaneous*, as presented between the systems of peoples existing side by side with each other; or *successive*, as between systems following each other in time. This difference in succession, appears in any particular people when its system of Right passes through a process of formation in history. In like manner, there is a process of development in the history of Right that embraces the whole of Mankind, and in which every people has a particular share. Every people forms a link in the great chain which stretches from a beginning lost in the night of time, through the historical ages, to the end that is to come. The Right of any one people is therefore not merely a fact belonging to this individual people, although it may appear such when we view it in its contemporaneous relations:<sup>2</sup> in the historical succession of the

<sup>1</sup> The Roman Jurists indicate and designate this progress by the expression 'jus gentium.' The peoples are now separated, governments founded, property divided, lands bounded, fixed dwellings erected, and obligatory intercourse instituted (L. 5, D. *De just. et jure*). Right has been realized in consciousness; and the 'jus gentium' is founded upon the 'naturalis ratio.' This philosophical apprehension of the *jus gentium* by the Roman Jurists, is to be distinguished from the practical significance which the conception had for the Romans; the latter falls to be dealt with in the History of the Roman Law.

<sup>2</sup> The Roman Jurists stopped at this point, as in their view the pro-

peoples it belongs, at the same time, to the whole of Humanity.

This movement in the historical formation and development of Right, may be partly divined, partly traced with clearness, as it advances from step to step and from member to member of the succeeding peoples. The principle of Right has gradually unfolded itself to greater purity and clearness by laying aside, at stage after stage of its history, the accidental envelopments which have covered and obscured it. Among the Roman people, it attained the completeness and perfection which it was destined to reach in the ancient world; and the Roman system has been handed on to the modern world, in which a new march of development and progress has been begun.

We may say, generally, that the first relation of the function of Right, which we have indicated as the mastering and controlling of the inequalities of individual life, has been realized in the system of the Roman Law. To perfect the function of Right on the other side, in realizing the security and protection of individual rights, without derogating from the principle of Equality already won, may be indicated as the vocation of the modern world. This, however, is not to be taken as suggesting that the Romans ignored this latter element of Right; a glance into the remains of their juristic literature, shows that it was otherwise. But, on the whole, only the beginning of the realization of Right was made by the Romans; and particularly in that

gress of Right from the *jus naturale* to the *jus gentium* finds its end in the *jus civile*, the system of Right realized by a particular people. In the *jus civile* all the problems left over by the *jus naturale* and the *jus gentium*, are resolved.

department of Right which it was their main task to cultivate. With the greater variety which distinguishes our outer and inner life from that of antiquity, the number and importance of the particular relations and conditions it embodies, have, at the same time, increased. The system of Modern Right, has to recognise and accept these new relations and conditions, and its special problem is how to attain a satisfactory result in dealing with them.

## Chapter Second.

### THE ORIGINATION OF RIGHT.

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#### A.—THE ORIGIN OF RIGHT GENERALLY.

##### 10. Right a Divine Order. The Consciousness of Right.

THE existence of the Right which determines and regulates human relationships, rests upon the consciousness which man has of Freedom in the act of will. This consciousness man has derived from God. Right is thus a form of the Divine order which has been bestowed upon man, and received by him into his consciousness.

The principles of Right come into Existence in this form of human consciousness. But, it may be asked, by what way do they enter into consciousness? In solving this question, the same distinction has to be made between the supernatural and the natural that applies to Religion; and indeed Right itself, as Righteousness, is to those who have not lost the knowledge of its origin, a part of Religion. Right comes into the human consciousness, partly by the supernatural way of Revelation,—the very first declaration of Right being attributed in Scripture to God,—and partly by the

natural way of a sense and impulse inborn in the Human Mind.<sup>1</sup> Here we have to deal with this natural origination of Right, in which the real Creator of it remains concealed in Himself, and Right appears in fact as a creation of the human spirit. And in its further development and formation, it not merely appears, but actually becomes a product of human activity.

All human Right presupposes a common Consciousness as its source. A principle of Right becomes a fact by being recognised as such in the common conviction of those to whom it is applicable. Right is the common will of the persons or members who are included in a sphere of Right. Through this common consciousness of Right, as by a common Language and a common Religion, the members of a people are bound together in a definite union. This union rests upon a certain relationship of body and mind; it extends beyond the intimacy of the inner family bond, and arises out of an actual division of the race of mankind. The consciousness which per-

<sup>1</sup> [The idea that the origination of Right is to be explained partly as proceeding by way of supernatural Revelation, and partly by way of the natural community of the People, is certainly a very old opinion, and it has specially been represented in the Christian Church. But the view is still older which seeks the origin of Right neither in what is specially theological nor in what is merely mechanical, but rather in what is *ethical*, as the mean between these two opposite members. According to this theory, the order of Right, however external, negative, and in need of constant improvement it may be, is recognised as an ethical Good, which disciplines the purely natural association of Nationality, and thereby points beyond itself to a deeper and more internal ethicality, by securing for the individual, as well as for the ethical whole, the room in which it may develop itself and attain to that higher destination (Schleiermacher, *Entwurf eines Systems der Sittenlehre*, § 177, 178). This ethical doctrine, following upon the influence of the theological view in deepening the apprehension of Right after it had sunk into what was merely mechanical, appears to be making way in the jural consciousness of our time.—RUDORFF.]

meates the members of a people in common, is born with them and makes them spiritually members of one whole. It constitutes, in a word, the national mind or spirit of the people ; and it is the source of human or natural Right, and of the convictions of Right which stir and operate in the minds of the individuals.

The consequence of this mode of origination, induces a diversity of Right among the various peoples. Peculiarities in their views of Right, belong not less to the characteristic marks of different nationalities than do the peculiarities of their Languages. As the fellowship of Right is one of the spiritual bonds which hold a people together, so the peculiar development of the consciousness of Right is one of the elements which distinguish any one people from all others. If a people splits up into several divisions, the relationship between them in Right, as in Language, will continue to remain visible ; and, on the other hand, each of the new nationalities will pass through a peculiar development in both connections. This phenomenon we may, for instance, perceive most distinctly among the peoples that have arisen out of the Germanic stem. In like manner, even in one people, without its being parted into independent sections, there arise national divisions distinguished from each other like separated peoples : the one people being distinguished into certain tribes, and these again into smaller branches. These divisions of a people are distinguished from each other in their views of Right by certain idiosyncrasies ; especially in those points in which their individuality works most decisively. Nevertheless, the peculiarities thus arising, are maintained in harmonious co-operation by means of those views of Right which are common to the whole people, under which these peculiarities appear but as

individual and partial deviations. Thus every people has its own form of Right corresponding to the national characteristics, which, like its Language, is the property of all the tribes and branches into which it is divided. And along with this common possession of Right, we find among the different divisions of the people, certain peculiarities in Right, as well as in Language, which indicate a peculiar local and limited origination. Right, as well as Language, has its provincialisms.

Hence arise the notions of a *Common Right* and a *Particular Right*. These notions are, in themselves, relative. Common Right may be called the Right of the larger divisions of the people, in contrast to the particular Rights of smaller sections embraced in the unity of the whole. The relation between these two is that of genus to species, or of species to variety. Usually, however, the phrase 'Common Right' is used only for that Right which belongs to the whole people in common; and 'Particular Right' for the special Right of one of the divisions into which it immediately or mediately falls. We use the expression 'Common Right' only of that Right which has no higher genus over it, and to which it would have to be referred as 'Particular Right.'<sup>1</sup>

## 11. The People and the State as related to Right.

It has been said that Right comes into existence in human consciousness; and this consciousness has been

<sup>1</sup> [As there is a Particular Right of the several branches and divisions of the people within the whole National Right, so there is formed between and over the Nations into which the whole of Mankind is divided, a Common International Right; but of its mode of origin the analogy of Language gives no rule of explanation. The *ratio naturalis* is still more general.—RUDORFF.]

determined, more precisely, as the consciousness of the People. But the actual existence of Right takes the form of fact; and for this the mere consciousness of it does not suffice. We can only ascribe a reality to Right according to its nature, when the relations of life are ordered according to what it prescribes. Right is embodied in rules of action; it enjoins that something be done or be left undone. The consciousness of Right is, therefore, at the same time, the Will that what is conformable to Right shall become a fact.<sup>1</sup> With Right there is thus given, by implication, the possibility of what is not right but wrong, as a state of fact which is not conformable to the prescriptions of Right. The will of the subjects or associates of Right, is directed practically to the realization of Right and to the removal of wrong. This Will, however, needs an organ in order to be carried out in fact. And this organ, in which the Common Will is embodied, and by which it receives its realization, is the power or government through whose existence the people becomes a civil commonwealth or a State.

The same power which generates Right also forms the State. Without the State, Right would have only an incomplete and precarious existence. Apart from the

<sup>1</sup> A Roman Jurist (Ulpian) defined the sense of Right (*Justitia*) as a Will: *Justitia est constans et perpetua voluntas ius suum cuique tribuendi*. He then indicates the Precepts of Right thus: 'Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere' (L. 10, D. *De just. et jure*, i. 1). The latter two Precepts indicate those which refer to the relationship to other persons, and which are partly of a negative and partly of a positive kind. The first Precept refers to the person of the individual himself. The Jurist thus signifies that it is not enough merely to injure no one and to give every one his due, in order to avoid coming into collision with Right. Right thus further implies that any unworthy mode of conduct is a degradation of our own personality.

State, the Common Will upon which Right rests, would be rather a mere wish than a real, effective Will.

The People and the State stand in the closest connection with each other. The national union is the basis upon which the political institution is reared; it is the soul and the life which permeates the organism of the State. The combination of several peoples into one and the same State, is a modification of their natural conditions; and its permanent success depends upon whether one of the national elements is powerful enough to assimilate the rest. Till this has taken place, unless perchance some common external danger somehow compels union in action, inner dissension will accompany any deviation from the path of nature, although the dominating element is perhaps strong enough to hold the conflicting elements in order by external force or policy. On the other hand, one people may form itself into several States. If these States form together a political whole corresponding to the body of the people, this is no deviation from the natural order of formation; the peculiarity lies only in the greater relative independence of the members of the political whole. An anomaly, however, would arise if this independence in any case, extended itself so as to absorb the political unity to such a degree that a political union corresponding to the range of the whole people no longer remained. Here the political separation will either have an internal national division for its consequence, and the people will divide into several peoples, or, if the national unity is powerful enough, it will succeed in overcoming the accidental political separation. In either case the anomaly, which may have existed for some time, will again cease. The internal connection between Peoples and States is also seen in their relation to the

soil. To every people its own particular portion of the soil is assigned ; and with this it grows up so that this portion of the land belongs to its very being and becomes its Country. The people thus become changed by emigration ; and, conversely, immigrants are gradually permeated by the national spirit which, as it were, broods over their new country, and so they become nationalized. Hence the State, in like manner, rests upon a territory ; and thus States come likewise to form divisions of the earth.

But notwithstanding these points of connection, a People and a State are distinct in idea ; and they ought to be carefully distinguished.

The State is not a natural union like the People, although it is founded on this natural union. States arise, like Right itself, through the medium of the human Will. This must not be misunderstood. The position is only to be maintained in the same sense in which it has been adopted in connection with Right. As it holds of Right, so the State, in its ultimate origin, is a thing given and instituted by God. Government, and obedience to it as the ruling power, are from God. The mind of man has not invented these institutions, but the formation and development of States and their constitutions have been left by the Creator to the human agencies and methods that arise out of the will and freedom of man. Hence it is not the Will of the individuals as such, which forms the State; this Will would never be able to produce an organic whole such as the State is ; and no State has ever arisen in this way. But the Will of the People, the Will which men have as members of this natural union, is the natural source of the State and of its constitution. The spirit of the people, as the national spirit, brings forth the

State in the same way as it evolves Right ; it does this by uniting the members of the people in the will to subject themselves to its authority as the organ of Right.

The philosophy of the Eighteenth Century grounded the State upon the will of the individuals, according to the theory of a Compact concluded with each other. This was the theory of the Social Contract,—the *Contrat social* of Rousseau. Among more recent thinkers the view has greatly gained ground, which regards the State as a natural growth, whose formation is independent of the human Will. Both theories are equally far removed from the truth ; the truth of each lies only in its negation of the other.

From what has been said, the relation of the State to Right becomes at once apparent. Right does not primarily arise out of the State ; much rather does the State presuppose a consciousness of Right,—a Right which it is its main task to protect. The error of regarding the State as the source of Right, is shared by most politicians. One party of them derives the institution of Right from the governing Power, and the other—as if to turn the conception upside down—derives it from the People in the political sense of the term, as the governed classes in contrast to the governing class. Both views are erroneous. The origin of Right lies outside of the State ; and this is so not merely in reference to its supernatural origin through the Divine ordinance, but in respect of its natural genesis through the national Will. This Will is not the will of the people as a component part of the State, but of the people as that natural union which is the foundation of the State. The State presupposes the principle of Right ; but it presents, at the same time, the necessary comple-

tion of Right. They have both a supernatural and a natural origin in common; they rest at once upon the order of God, and upon the will of man as the member of a nation.<sup>1</sup>

## B.—THE VARIOUS SOURCES OF RIGHT.

### 12. Conviction of the People; Legislation; Science.

The genesis or unfolding of Right out of the spirit of the People, is an invisible process. Who would undertake to follow the ways in which a Conviction arises among a people—how it germinates, grows, shoots forth, and unfolds itself? Those who have undertaken to do so, have mostly started from mistaken notions. Some supposed that such Convictions were communicated to the people from without, by the instruction of learned men. Others thought of the matter in this way: that what some one somehow did among the people, others imitated; and when these at last formed a majority of the people, by the power of Custom the people came to

<sup>1</sup> [The Romans here likewise followed a very sound view of Right. The *ratio naturalis quasi lex quaedam tacita* (L. 7, pr. D. de bon. damn. 48, 20), to which Paulus carries back the succession of descendants, is God's world-order, in accordance with which the generations of men relieve and succeed each other. The *jus gentium* contains the common international order of Right among the Nations. Both of these are more universal than the individual State and the individual People, as on the other side the particular Rules of Right in more limited circles (*lex civitatis, jus proprium peregrinorum*, etc.) appear more narrowly limited both in their sphere and origin. And as there is a conviction of Right outside of the State, so the State again as an ethical organism is not to be merged wholly in Right, although Right is its immanent law. The barren State of Right, of which the moderns dream, contains an abstraction that was alien to the conception of the Romans.—RUDORFF.]

imagine that this ought just to be so. By such fanciful conjectures, attempts have been made to bring the hidden process to light, and to substitute for the inconceivableness of the invisible the convenience of a common tangible fact. On the other hand, those who held less materialistic views have, at the best, been able only to make probable some unconnected points in the path whose connection as a whole remained unexplored.

What is visible to us is only the product, Right, as it has emerged from the dark laboratory in which it was prepared, and by which it became real. It may assume, when it thus appears, a threefold form:—(1) as the immediate Conviction of the members of the People, revealed as such in their actions; (2) as Law; and (3) as the product of Scientific Deduction. The organs which thus give a visible form to Right, are the special Sources of Right. As such they may be designated (1) Immediate Conviction of the People; (2) Legislation; and (3) Science.

### 13. National Conviction and Customary Right.

The Conviction of the People, as reflected in the Consciousness of its members, is the first of the modes in which Right arises, because it stands nearest to the primary source of all human Right, and is immediately connected with it. The complete externalization of this Conviction, is effected by the members of the people acting in conformity with their conviction of Right, and thus recognising it in practice. This usage or practice by the individuals, owing to its being founded upon a common conviction, is uniform in similar circumstances. It has thus the property of a common practice or Custom;

and hence the Right that has arisen in this form is called CUSTOMARY RIGHT.<sup>1</sup>

The share which Usage has in connection with the origination of this form of Right, is frequently represented so that Right is said to arise out of Custom: an opinion which agrees with the materialistic notions already mentioned as to the genesis of the views of the People. The true view is just the reverse. Usage is only the last fact of the process, by which the Right, which has arisen and is living in the members of the people, completely externalizes and embodies itself. The influence which Custom has upon Conviction, only amounts to this, that the Conviction may be brought by it into distinct Consciousness and so confirmed. This may be made plain by an illustration. It is a doctrine of Right that in the transfer of property, a mere agreement between the previous owner and one who is about to become the owner in virtue of this contract, does not of itself suffice, but that a further act, such as the actual delivery of the thing into possession, must supervene. Now the principle of Right is exhibited in the continuous usage, which determines in all cases that one who could refer only to such an agreement, is not yet held to be the owner. Such a usage or Custom, may contribute to the certainty and security of the principle of Right, but it certainly did not originate it, for the usage would be entirely devoid of right in itself but for the antecedent principle on which it is grounded.<sup>2</sup>

<sup>1</sup> [Or CONSUELDINARY RIGHT, from *consuetudo*, custom.]

<sup>2</sup> My view that the Custom arises out of the jural Conviction, and no the latter from the former, is directly contrary to the hitherto prevailing opinion, and has been objected to by some.—The maintenance of the old error, rests upon the continued confusion of the question of the origin of Customary Right with the question of its Knowableness. It becomes

14. Legislation : Law and legal Right ; Statutes ; Observances.

To the supreme Power as the organ in which the universal or common Will personifies itself, the authority is given to execute that will. This function as a mode of activity, constitutes the Government. It may in consequence become necessary with reference to certain points, to establish expressly what is to be regarded as the Common Will, in order to make the action of the Government more readily harmonize with it, and to secure the subjects of the Government against possible arbitrariness. For the executive function rests upon a knowledge of the Common Will ; and this Knowledge therefore lies within the vocation of the Government, whether that Will is expressly declared or not. It may thus come to appear desirable that the supreme Power should declare beforehand what shall be held to be valid as the Common Will, and consequently what shall be its criterion as a Government in any particular relation. And this may be done by observing certain special forms prescribed by the Constitution. This second function of the Supreme Power is what constitutes Legislation. The legislative expression of the Common

knowable by Usage (§ 16) ; and it may be said that it is only presented as an object to the knower in practice. [Bethmann - Hollweg (*Civil process*, S. 30, n. 7, 1864) refers to the fact that the Conviction of the people viewed as Customary Right, upon which Hngo and Savigny were led to lay the most weight in opposition to the exclusive emphasis of statutory Law, appears completely as an original source of Right only in the Germanic Systems. The Roman Right, although born as regards its matter from the spirit and practice of the people, was, as regards its form, developed in harmony with the high culture of the earliest period, under the authority of the Government and the Jurisprudence of the Pontifices.

—RUDORFF.]

Will is Law ; and the Right which arises in this form, is LEGAL or PROMULGATED RIGHT.

It is to be expected that the Legislator shall actually express in the Law the common Conviction of the Nation, under whose influence he may be acting. In this relation he may either receive into his Law an already established view of Right, or he may take up a conception of Right that is only in the process of being formed, and embody it in a law. Some political constitutions seek to realize this idea by bringing in the necessity of referring any proposed Law to the judgment of a distinct Council, or by requiring the consent of certain members of the People to its enactment ; and if they do not thereby attain a guarantee of the conformity of the Law to the national Conviction, which it is not possible to guarantee, yet they so far tend to prevent the opposite issue of falling into contradiction with the national views of Right. When a Law has been finally enacted, its validity cannot be made to depend on an investigation of its actual agreement with the Will of the people. Such an investigation would presuppose the existence of a higher Power, which would accordingly be the legislative Power ; and then the same question would arise in relation to it. Whatever is therefore established by a Law in the constitutional way, becomes valid as right ; and it is to be regarded as the Common Will, not on the ground of its matter, but on account of the form of its expression.

Laws have been often regarded as the only source of Right ; or at least it has been held that under perfect conditions of Right, they are the only mode of originating rights. This view may well appear strange to any one who has even a very limited insight into the way in which Right arises. But on account of the prevalence

of the view, many have become accustomed to call every jural proposition a Law, and every mode of Right a product of Legislation. It has thus come to be thought that a perfect state of Right is only to be attained by all the modifications of Right being expressed in Laws. This view is contrary to the facts of experience, as might be shown, for example, by the history of the Roman Law.<sup>1</sup> Further, the impossibility of such a legislative undertaking must be apparent, which at the best could only be attempted in the case of a people whose national life was about to expire. At any other stage of a people's history, along with the completest Legislation, there will always be a mass of jural Convictions unpromulgated, which will maintain and develop themselves as such, and thus hold a place of their own.

A STATE consists of a number of lesser associations, which are homogeneous with the including whole, and are only different from it by being in themselves special members of that whole. Such are the incorporated *Towns* and *Village Communities*. These Corporations exhibit each a State on the small scale. The function of a wise Government in relation to them is, on the one side, to vouchsafe to them that degree of independence in the administration of their own internal affairs without which their existence in the condition necessary for the welfare of the State is inconceivable; and, on the other side, the State has to guard against such an isolation of them, and such a degenerating of their independence, as would result in the weakening of its own existence as a whole. This latter possibility was the

<sup>1</sup> And this may be done without laying too much weight on the well-known saying of Tacitus (which is only to be taken in a limited sense): *Corruptissima republica plurimæ leges.*

danger which threatened the States in former times ; at the present day, in consequence of the greater centralisation of the power of Government, the danger lies in the opposite extreme of too great a limitation of the Corporations. The administration of the smaller community having to be conducted under the supervision of the general political government of the State, there arises in it the same need as in the wider sphere of establishing rules on certain points by express regulation, so that they may be observed in it. With reference to such matters as bring the administration of the smaller Community into immediate contact with the interest of the State, the Legislation will properly proceed directly from the State itself. But with regard to those special interests in the Community, which affect the State as a whole only in so far as the Community is a member of it and shares in its weal or woe, the institution of the requisite regulations will be properly left to the Community, under the general supervision of the State-government. Thus there arises in these Communities an activity analogous to the political legislation, and which in contrast to it has been designated the Autonomy or Self-government of the Community. The regulations thus constituted are called STATUTES. This Autonomy, moreover, does not express itself in overt regulations only, but it is also embodied in silent, unexpressed forms in practice ; and in these forms they are called OBSERVANCES.

The formation of such Corporations is not limited to the local Communities. The impulse to animate and complete the great organization of the State by means of particular unions in certain special directions, has brought forth other Corporations, such as the *Universities* and

*Guilds.* And these have developed within them an activity similar to that of the other Associations.

Finally, Christianity has instituted the *Church* as a body which is placed side by side with the State, and is found in a peculiar relation to it. In virtue of its special character as a religious Society, the Church is in certain relations dependent on the State, and in other relations it has a complete independence. This independence of the Church and its Government, is of a different and higher kind than that of the other Corporations, and it claims a certain parity with the State. This is shown by the fact that the Church has ascribed to it not merely Autonomy, but the power of Legislation. Like the State, the Church likewise includes lesser Corporations in itself; and to these also a certain Autonomy belongs in relation to the Legislation of the Church, as in the case of the secular Corporations and the State. But the question of an Autonomy of the Church as such within the relations of the State, can only arise in reference to those points of her existence in which she is dependent on the State, and which therefore fall within the sphere of the political Legislation; and it arises in fact, only where the State may leave the institution of the relevant regulations to the Church.

### 15. Scientific and Juristic Right.

The jural propositions, which together make up a system of national Right, stand in an organic connection with one another. This organic connection of these propositions is explained primarily by the fact of their arising out of the spirit of the same people, the unity of the source extending also to what has been derived

from it. This fundamental relation, however, does not exclude the possibility of a dissonance intervening so as to disturb the harmony of the several parts included in the system of Right, since the spirit of the people is always exposed to disturbing influences, which may be compared to the maladies that attack the health of the body. Such disturbances most readily arise from unskillful exercise of the function of Legislation, as when the legislator substitutes an arbitrary interference for what would otherwise be desirable energy of action, or when he confounds a call for rapid redress with a demand for the improvisation of new laws. In this fundamental relation, the Right of a people may be compared to its Language, which, as regards the source and connection of its elements, likewise rests upon certain principles and rules contained unexpressed in itself, and which it is the function of science to bring to light and to unfold in consciousness.

The property of Right, in virtue of which its several propositions thus form the members of an organic whole, is further grounded upon the Rationality that belongs to its nature. And, as we have already seen (§ 2, 8), the rationality and the manifoldness of the propositions of Right, are related to the fact that by the principle of Right, the conditions of Inequality in human life have to be subjected to the principle of Equality, without, however, being abolished by it. The formation of Right thus arises out of the continual antagonism of unequal relations, and the continual subjection of them to the control of Right. From this process the various institutions of Right arise. Thus, the jural propositions that find expression regarding Property, Obligations, and such like, assume various forms; and the same holds true of

the more special propositions and institutions by which these are constituted in further details. They assume these differences in form, because the inequalities of the existing relations react upon the expression of the principle of jural freedom, and because Right is thus exhibited as equality modified by inequality. Hence Right, although springing from Freedom, is conditioned by the natural necessity of its objects; and it thus becomes rational. Its propositions accordingly attain systematic connection, as mutually conditioning and presupposing each other; and it is possible to reason from the existence of the one to that of the other. We may take as an illustration these two jural propositions: (1) that the Owner of a Thing has an immediate dominion over it, by which fact his relation is distinguished from that of a person to whom something is only due from another, and to whom therefore only the action of that other person, and not the thing itself, is subject; and (2) that the Owner of a Thing can vindicate it from any one who withholds it from him. These two propositions are not indifferent to one another, so that the one could be modified without the other being affected. On the contrary, they necessarily hang together; they presuppose each other, and the one may be deduced from the other.

It is the function of Science to arrange the propositions of a system of Right in their organic connection, and to make them comprehensible as arising out of and conditioning one another. And the aim of its method is to trace the genealogy of the several propositions in question, up to their first principles, and then to show how to descend from these principles down to their furthest offshoots. This process unfolds and brings into clear consciousness those elements of Right which lay

hidden in the spirit of the national system, and which may not be brought to light either in the immediate Conviction of the members of the people, nor by their actions, nor even in the utterances of the Legislator. They thus visibly arise for the first time as the product of a Scientific Deduction. Science accordingly becomes the third source of Right; and the Right to which it gives rise is SCIENTIFIC RIGHT, or from its being evolved by the activity of the Jurists, it may be called JURISTIC RIGHT.

The latter expression may have a still wider meaning. Juristic Right may be understood as signifying the Right which lies specially in the consciousness of the Jurists, and which is professionally represented by them. This holds more particularly in the advanced periods of the history of a people when the system of Right has lost its earlier simplicity, and when in consequence it can no longer be known by all the members of the people with anything like completeness. In the course of time this applies to by far the greater portions of all the departments of Right. Even Customary Right, apart from the peculiarities of particular places and districts, will likewise thus come to live and develop itself pre-eminently in the consciousness of the Jurists, as the members of the people most completely cognizant of rights, and most constantly occupied with jural interests in virtue of their profession. The Jurists thus become the natural representatives of the rest of the people in matters of Right; and in this sense Customary Right may also be included in Juristic Right. 'Scientific Right,' as the less ambiguous expression, is therefore to be preferred as the proper designation of that Right which has Science as its source.

## 16. The Means of Knowing Customary Right.

Every jural proposition which is entitled to be recognised as such, must have arisen through one or other of the three Sources of Right: Immediate Conviction of the People, Legislation, or Science. The practical interest in the investigation and knowledge of these sources, lies in the fact that it is by reference to them that the answer must be found to the question, whether a certain proposition is a proposition of Right? The problem thus arises: how to determine the conditions under which the existence of a proposition of Right is to be accepted as established by means of these sources of Right; or in other words, how are we to know and recognise the existence of any proposition of Customary, Legal, or Scientific Right, as such? — This knowledge must be drawn from Documents if the Right in question has been put on record; and in this case it is called 'Written Right' (*Jus scriptum*). But if the Right is not contained in special Documents, or cannot be derived with certainty from any Record, the knowledge of it must be obtained from other sources.

As regards CUSTOMARY RIGHT, the most natural Source of Knowledge is the Usage in which the jural Conviction of the people is actively manifested and reflected. This Usage consists of actions which contain an application of the Right in question. It may either be extrajudicial or judicial, as in the form of practice or adjudication (*usus fori*). An example will illustrate this distinction. Thus, it may be asserted that it is the Customary rule of Right in a city that the outgoing tenant must leave a dwelling-house entirely in the same condition in which he received it; and accordingly that

it must be newly painted and decorated if it was delivered to him in that state. Now the jural principle here concerned, may have been so maintained in practice that the tenants may have come to an understanding to act upon it without its having been settled by a legal process ; and in this case the Usage is *extrajudicial*. But it may also happen that a tenant having refused to comply with this custom, may have been compelled to implement it in consequence of a judicial sentence ; and in this case *judicial* Usage is superadded to the customary recognition of the Right in question.

It may then be asked, what must be the condition of the Usage in order that it may form a valid and reliable means of obtaining a Knowledge of Customary Right ? In this connection it becomes practically important to determine the view that should be held regarding the relation of Custom to Right.<sup>1</sup> We determine the principle upon which this question may be answered thus : the Usage will possess the required condition whenever it can be shown to be the outcome of a common Conviction of the people.<sup>2</sup> And for this two things are requisite. (1) The Usage in the case must have the character of a matter of Right, and be of the nature of a jural necessity. Hence in the example referred to, if the tenant was led to understand that the restoration of the house in a certain condition was only a matter of liberality or mere goodwill, the act could not be regarded as included under Usage of Right. (2) The Usage must be constantly

<sup>1</sup> Cf. § 13.

<sup>2</sup> According to the view which has hitherto been generally received, and which we have rejected above (§ 13), the question would have to be put thus : What must be the condition of a Usage in order that it may produce a Customary Right ? No principle can be assigned by which this question could be answered.

repeated, and must return in similar relations in the several cases to which the Usage of Right applies; in other words, it must have the character of an established habit or Custom (*longa consuetudo*). This quality of the Usage has the effect of removing the possibility that the agreement of the acts in question may be accidental, although they may happen at different times and may be performed by different persons. The supposition that this Usage may not be founded on an inner unity of jural Conviction, thus becomes so extremely improbable that it must be rejected. However, it is never to be forgotten that custom or observance has authority only to the extent that we may infer from it to the existence of a position of Right, but it is not to be considered that the custom itself makes the Right. No importance is therefore to be laid upon it, if it is otherwise certain that there is no Right which can have obtained manifestation in it. Thus, if a certain proposition is decidedly contrary to the Divine commandments, or to principles of Right which admit of no exception, we cannot recognise it as a jural proposition, even although a long and constant custom may be referred to in support of it.<sup>1</sup>

Further, Custom is not the only means of obtaining Knowledge of Consuetudinary Right. The testimony of credible persons regarding its existence, and credible indications of it in fact, may prove it, or at least may contribute to establish it.

<sup>1</sup> This is enunciated in a Constitution of the Emperor Constantine (L. 2, C. Quæ sit longa consuetudo ? 8, 53) : ‘Consuetudinis ususque longævi non vilis auctoritas est, sed non usque adeo sui valitura momento, ut rationem vincat aut legem.’ A case which may have given occasion to this utterance is referred to farther on in § 20.

### 17. The Means of Knowing Legal Right. Criticism ; Interpretation.

The most important Source of Knowledge in regard to **LEGAL RIGHT**, is the Text in which it is composed, that is, the Document in which it is laid down. This means of Knowledge is, on the one hand, the simplest, and the most accessible to all ; and thus far this form of Right appears at the first glance to have a great advantage over any other. But, on the other hand, the ascertainment of Legal Right involves certain peculiar difficulties, and in order to overcome them a special Knowledge of matters is required, which is not possessed by all. It is a mere illusion to believe or maintain that by merely being brought into the form of Laws, Right is thus made more certain, more indisputable, or more universally knowable.

The difficulties connected with the determination of Legal Right arise (1) partly from the condition of the terms of the Law, as the special means of obtaining Knowledge of it; and (2) partly also from the nature of Legal Right itself.

1. As regards the former ground of difficulty, it is to be noted, first of all, that the *Genuineness or Authenticity* of the Words in question, may be doubtful. The terms of the Law referred to, may have been falsified ; and the older the Law is, the greater is the possibility of this being the case. Such doubts may have reference to the whole document, as well as to its individual words and propositions. The scientific activity, which aims at reaching certainty regarding these points, must proceed by investigation of the Authenticity and Genuineness of the Document in question ; and this investigation may

have regard to it as a whole, or to any of its parts. CRITICISM is therefore a function of the jurist. And it becomes necessary in the case of all the jural propositions transmitted by documentary means, and for all titles of Right that have to be proved by documents. It thus relates to the whole range of the subjects of Legal Right.

Again, the *Meaning* of the Words in question, may be doubtful. These Words are the witnesses for the will of the legislator; and this will must be derived from them. But the legislator may have used Words which admit more than one sense. This inconvenience will occur more frequently, according as the framer of the Law may be wanting in power over the requisite language, or as the process of legislation is more or less hurried through. And even the most careful attention will not always avail to prevent such difficulties arising. The examination and elucidation of the *meaning* of the Words that embody the will of the Legislator, is called INTERPRETATION. Such Interpretation rests upon *scientific* principles. It is therefore to be distinguished from the process by which the meaning of a former Law is determined by that of a later one, or by reference to the common Conviction of the people, which is what is properly called 'Legal Interpretation.'<sup>1</sup> This Legal Interpretation is the process by which a new jural proposition in Legal or Customary Right, relating only to the Law under interpretation, is so unfolded that in any practical application it shall be regarded as having been already contained in the said Law.—The basis of this properly

<sup>1</sup> Legal Interpretation is divided into 'Authentic Interpretation' and 'Usual Interpretation.' The former is furnished by the Legislator, the latter is derived from the Conviction of the people.

scientific Interpretation (which may be distinguished from 'Legal' Interpretation as 'Doctrinal' Interpretation) is twofold. 1st. It is founded upon the Meaning of the Terms employed. The sense must be derived from the words used; it must be conform to them, for the Law is just the will of the Legislator as expressed in his words. If it could be shown that the will of the Legislator was really something quite different from what he has expressed, his will would not be valid, because it has not been truly expressed, nor would the Words be valid because they would not really contain the will of the Legislator. 2nd. In addition to the Words, the Interpretation has also to consider other circumstances by which the will of the Legislator is made clear. Such are the Principles of Right which he has otherwise recognised, and from which the determinations in question may be deduced. When a certain rendering of his Words would show a divergence from these recognised principles, and such a divergence is either inconceivable or at least cannot be referred to any probable occasion or cause, it is to be rejected. Further, the purpose which the Legislator had in view in enacting the Law, and in general all the circumstances which may have influenced his will, and from which an inference may be drawn to that will, have to be taken into account. The ascertainment of the sense of a Law by reference to its terms and the rules of language, is called 'Grammatical Interpretation'; that which is derived from other grounds is 'Logical Interpretation.' These are often regarded as two entirely independent modes of Interpretation, of which the one can be applied without the other, so that recourse cannot in any way be had to *logical* Interpretation, if the *grammatical* Interpretation

gives a relevant and adequate sense. But this view overlooks the fact that the determination of the question as to whether the sense *is* 'adequate' already goes beyond the sphere of the so-called 'Grammatical' Interpretation. The truth of the matter under consideration may be put thus. If there is nothing uncertain or unambiguous in the terms of the Law, and if there is no impossibility or manifest untenability in the way of accepting a certain definite meaning, then it is not legitimate to represent the Will of the Legislator as doubtful, on the ground of probabilities drawn from other sources; for it would then in fact become impossible, even by the most careful choice of expressions, to secure the intended meaning of a Law against arbitrary renderings. The rule which a Roman Jurist lays down for the interpretation of the Dispositions of a testator: 'Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio,'<sup>1</sup> is also to be applied to the interpretation of Laws. But it is not therefore the less true that a separation of grammatical and logical Interpretation, in the sense indicated above, is not to be admitted.

Finally, doubts may arise as to whether a certain Law has valid existence at present. Laws continue to have an external existence in the Record by which they are made known, even after they have been repealed. Thus no one can learn from the mere Document in which a Law is contained, whether or not it has been set aside by a later Law. It is not enough, therefore, to know only the particular Law, by which Right is established in a certain relation; we must also be acquainted with all the Laws in that sphere, in order to avoid the error of regarding a repealed Law as still valid. The case is

<sup>1</sup> L. 25. 1 D. De lege, iii. 32.

otherwise with regard to Customary Right ; for if any jural custom changes and another jural conviction takes its place, the external fact of the former usage will also then cease to exist.

2. The other main difficulty in the way of obtaining knowledge of Legal Right, springs from the very nature of Legal Right itself. A Law becomes a fact by its constitutional promulgation and publication ; and this takes place by means of a definite act at a particular moment of time. The Law becomes valid and applicable at the date of its publication, unless some later date is laid down by the Legislator at which it will come into operation, thus instituting a certain *vacatio legis* after the publication of it ; or, conversely, the validity of the Law may be carried back to an earlier date. This latter relation is silently implied in the fact that a new Law is to be regarded as giving an authentic interpretation of the former Law, its expressions having to be taken as if they were already included in that prior Law. It has therefore to be applied from the date of its validity wherever an application of the former Law would have occurred ; and thus those Cases which would have fallen under the former Law, have now to be decided by it.

Hence, whatever may be the date at which the operation of a Law may begin,—whether it be the date of the actual publication of it, or sooner, or later,—the Law can only be applied to the cases that arise *after* that date, and not to *earlier* cases. Simple as this Rule is, its application may sometimes become difficult, from uncertainty as to whether a certain case is to be reckoned as belonging to the *facta futura* or *preterita*. And this holds especially when the case in question is not entirely limited to a definite point of time, but extends through a

certain period, during the currency of which the operation of the Law begins. For example, a Law may alter the time during which a certain Right can be acquired or lost ; and the question will then emerge as to how its application bears upon those cases in which the currency of their relative periods had already begun, but was not yet ended. Or, again, the Law may change the effects of a certain fact which have not yet become complete, or even may not as yet have appeared. The decision of such questions will turn mainly upon the nature of the facts to be dealt with ; but there are two Rules which must guide us with reference to them. These Rules are, *first*, that any fact which is not yet completed cannot be called a *factum præteritum* ; and *second*, that Rights already acquired, even although the time for their exercise has not yet come, are not to be infringed by the application of a new Law.

#### 18. The Means of Knowing Scientific Right.

It still remains for us to deal with the Knowledge of SCIENTIFIC RIGHT. A judge has very frequently to adjudicate upon relations regarding which no express determinations can be found in the contents of either Customary Right or Legal Right. In these circumstances it is Science, as the third Source of the Knowledge of Right, that has to furnish the propositions by which he has to decide. These, as scientific propositions, do not rest upon external authority ; they are valid only in so far as they follow with inherent necessity from the principles of the existing System of Right, and they accordingly claim the same validity as the propositions expressly included among the Convictions of the people

or contained in the Laws. Hence, knowledge of this species of Right is to be derived from internal principles, and particular rules cannot be laid down with any completeness regarding it. The whole Science of Law must furnish guidance to Knowledge of Scientific Right. Every Jurist, and every Judge in so far as he is a jurist, should regard it as falling within the sphere of his vocation ; and all juristic literature is auxiliary to it. The agreement of the most distinguished Jurists, gives rise to a presumption in favour of the scientific truth of a proposition ; and that presumption is strengthened by the fact of its continuous application in the Courts. But neither the wide diffusion of a certain view nor mere practice of it, has any absolute authority in and by itself ; they must both yield to better knowledge of the truth where a Scientific Right is in question. Further, both Customary Right and Legal Right, in so far as their principles are capable of being determined on internal grounds, must have their foundation established by Science. It is only by this mode of treatment that we become conscious of their essential principles, as well as certain of having a correct understanding of what is immediately presented in the forms of Popular Right and Law.

### C.—THE CHANGES OF RIGHT.

#### 19. Change throughout the Historical Movement of Right.

As a People changes throughout its whole sphere of life in the course of time, the same condition holds true of its system of Right as a branch of that life. Right is not fixed or stable at any particular time. It develops with the People. It attaches itself to the national

character at its different stages of culture; and it adapts itself to the changing wants and requirements of the People.

This process of change, does not so alter the subjects of it that they in any way cease to be identical and the same. The People at the beginning and at the end of their historical career, are the same people, though they may present differences here and there. In like manner, their system of Right becomes different, and yet it is always the Right of the same people. Not only do the jural propositions which contain at any one time the Right of a people, form members of an organism, but the system as a whole, maintains this organic quality in its progressive movement. The successive relations in the sequence of the constituent positions of the system of Right, are also organic. This may be expressed by saying, in a word, that *Right has a history*.

The most external characteristic in this historical alteration of Right is, that its determinations advance from an original simplicity to greater multiplicity and variety. This process goes hand in hand with the expansion of the relations and requirements of the national life, and therefore with the more manifold development of the material which reacts upon Right, and which Right has to master and control. And in connection with this process the fact comes in, that the peculiar and distinctive spirit of a people gradually opens to the influence of more general thoughts that reach beyond the self-enclosed character of the people. For, all culture consists in the reception of what is Universal, and which, in becoming wedded with the Particular, overcomes its natural crudeness and isolation. This condition becomes visible in the sphere of Right as

its initial state of rigid, national peculiarity is gradually modified and mitigated by more general elements operating upon the consciousness of Right. This process of change, will obtain different forms among different peoples, and it may be retarded or hastened by particular circumstances. In the Roman Law the distinction of the *jus civile*, and the *jus gentium*, illustrates this; and among the Germanic peoples the reception of the Roman Law has the same significance. The most essential influence determining this process of change, lies in the position held by the people as a constituent member of the whole of mankind. Every people has its own share assigned to it in the purpose that is to be worked out by the succession of all the peoples; and in the sphere of Right it has also to perform its part of the common task. Any one people will therefore approach the goal of its destination by the different stages of evolution through which its form of Right passes.

The process of the progressive formation of Right, ought to keep pace with the development of the people. It will never fail of its end if the free movement of the three Sources of Right operative in it, is properly maintained. But this co-operative relation may be disturbed; as happens, for instance, if the effort is made to weaken the influence of the immediate Conviction of the people or of Science, and to put the whole power over the determination of Right into the hand of the Legislator. In that case, one or other of two possible results can hardly be avoided,—either Right will fall behind the requirements of the time, or it will be put out of its proper connection with the life of the people by sudden innovations in the Legislation. And in either case it will cease to be in harmony with the national development.

The proper movement of Right will, however, be such that it can only become manifest to those who can survey the whole of it as an uninterrupted process. On the other hand, it will appear as stagnant or unprogressive to any one who does not feel as a member of the people, but occupies individually an attitude of antagonism towards it, in the maintenance of his own isolated purposes. And this will hold whether he praise the system of Right on account of this very stagnation, until he is suddenly awakened from his dream; or denounce it, because it does not pander to his individual and private interests.

## 20. Abrogations of Particular Propositions and Rights. Antinomies.

We have regarded Right, on the whole, as subject to change. If we now look back at the several details of Right, it will be seen that the process of alteration goes on through the rise of new manifestations of Right. These may assume one or other of two relations to the previously existing modes of Right; they may either allow them to continue to exist along with themselves, or they may abrogate them in whole or in part.

Every abrogation of a jural proposition involves the rise of a new proposition, along with which the former can no longer exist. Hence a jural proposition can be abrogated only by reference to some of the Sources of Right. The truth of these positions, may be doubted when it is found that a mode of Right falls out of use in virtue of the popular Conviction—*desuetudine obliteratur*—or is repealed by a Law which introduces nothing new in its place. In such cases it may appear that there is the

abrogation of a right without the origination of a new right. In reality, however, a certain new Right also arises in these cases by the act of abrogation, for the very fact that the old position is no longer to be valid constitutes a new jural position. Besides, the opposite of this would be unthinkable ; for although every change is not an act of abrogation, yet every act of abrogation is a change of Right.

Each of the Sources of Right has abrogative power not only over the jural forms that may have taken rise through it, but also in relation to those that may have been brought forth by either of the other two. This power, however, belongs to it only in so far as it is able to bring forth a form of Right identical in extent with that to be abrogated, and therefore capable of completely covering it. Thus, suppose that in a certain country it is established, either by Customary or Legal Right, that a creditor cannot effectively bind a debtor by promise to pay more than five per cent. of interest at most, with the further provision that no particular deviation from this rule shall be permissible. Then if any one tried to show that in a particular town of that country there existed a jural conviction, confirmed by long usage, that more than five per cent. was allowed, his allegation would have no force, because a particular right of this kind is impossible so long as the wider jural position exists along with prohibition of any special deviations from it. The wider position can only be abrogated by a custom of Right in common, and not by a peculiar observance.<sup>1</sup>

The abrogation of a form of Right, may be effected in such a way that the intention to do so is expressly declared, as when it is done by a Law that repeals it.

<sup>1</sup> L. 2. C. Quæ sit longa consuetudo, viii. 53. Cf. § 16, note.

But the abrogation may also be effected silently, by the mere introduction of a new form of Right, along with which the right in question cannot exist. It is time which here decides between the two jural positions. The older right must yield to the newer right. *Jus posterius derogat priori.* The incompatibility of the two rights under consideration is, however, always presupposed. Thus, in the case of a particular right existing in a country, when the Common Right is altered, generally or in reference to that particular point, but without the intention of abrogating any particular differences that may exist, the particular right will still continue in its own sphere as a deviation from the later position, just as it may have existed formally as a deviation from the earlier Common Right.

It may happen that two jural positions occur, especially in the written Law, that absolutely exclude each other, and with respect to which it cannot be directly determined which of them is to be regarded as the one that is valid, and by which the other is abrogated. In such a case we are presented with an *Antinomy*; the two jural propositions annul each other, and neither of them is valid on account of their mutual contradictoriness. Here the Right that is determined by Science, comes in to supply the want. The jural position required can only be derived from Scientific Right, and it must therefore be obtained by the application of internal principles in a scientific way. Thus, in that part of the legislation of Justinian which is compiled out of the writings of many of the Roman Jurists, certain divergent views appear, and the fact seems not to have been observed by the authors of the Justinian compilation. Now, it is sometimes not possible to determine

at once which of the recorded opinions is to be taken as the received doctrine. Under these circumstances, the contradictory passages are to be viewed as if they did not exist; and the question is to be regarded as left undecided by the written expressions of Right. We have therefore to determine the question at issue by reference to that Source which always remains open for our guidance, even when the authority of the popular Conviction and of the Legislator fails us.

## Chapter Third.

### THE SPHERE OF RIGHT.

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#### A.—SYSTEM OF THE RELATIONSHIPS OF RIGHT.

##### 21. Nature of the Relations of Right.

THE function of Right, viewed as to its object, may be indicated generally by saying that it has to determine the relations of men so that these relations shall become Relations of Right. The Relationships of Right are thus relations of men to one another, and they may be appropriately called juridical or jural relations. But as man stands in the sphère of Right as a person, we may at once determine the conception of these relations more definitely: they are *Relations of Persons as such to one another.*

Hence it is immediately apparent that the human relationships do not enter in their full extent into the sphere of Right, nor into the series of the relations of Right. For the notion 'Person,' rests upon an abstraction, and thus it does not embrace the whole being of man, but only includes directly the fact that he is a subject of will, while his other qualities are only indirectly taken

into account, according to their nearer or more distant connection with it. This abstraction accordingly extends to those relationships of men which have to admit of much modification and discount, in order to be viewed as mere relations of Persons as such, or to be taken merely as jural relations. Thus, suppose a man has risen from a protracted illness, and in order to pay the bill of his medical attendant, to provide for the urgent wants of his family due to his recent incapacity for work, and to procure the means of beginning his business again, that he goes to a well-disposed neighbour whom he has helped in his own better times to prosperity, and asks a loan, and obtains it at the usual rate of interest;—how much must we not leave out in considering this complex relation in order to get to its purely jural form! What an effort of abstraction is required to view as equal and the same in right, the relation of the borrower in this case and that of a rich man who raises capital merely in order to add thousands to his possessions by a new speculation! And yet the two relations are jurally and legally identical in fact, as regards the right involved.

It is further evident that by the introduction of the most varied human relationships into the sphere of Right, the relations of Right themselves are not thereby multiplied, since it is possible that relations which are entirely different in their human details may yet coincide in one and the same relationship of Right. This holds for the same reason as that no new Right arises from the discovery of new species of plants and animals. For since, as regards Right, these all fall under the one identical conception of Things, the relationships of Right under

which these objects are controlled, do not thereby become more numerous.

Under the reservation of greater or less modification already indicated, there is no kind of human relationship —assuming only that it is constituted by relations to other men—that is excluded from the possibility of receiving a juridical form and becoming a relationship of Right. The farther, however, the ground of the relation lies from the principle of Right, the more important will any other modification of it become, and the more readily will the relationship be withdrawn from the control of mere jural forms.

If we now look at the Relationships of Right by themselves, it cannot be denied that the conception is somewhat indefinite and fluctuating. No relationship of Right of the same kind, looks entirely the same as another, when we take their particular circumstances into account. And if we leave these circumstances out of consideration, the mere mingling of the jural elements themselves will continually give rise to new combinations.

There is something seductive in following this mode of viewing Right in these relationships, just as there is in being rocked upon the changing billows rather than seeking the solid hard land. It appears conformable to the living nature of things, to build the system of Right upon relationships, rather than upon the crude and hard conception of mere Rights. But the fluctuating nature of the relations of Right, is a difficulty in the way of any definite determination of them.<sup>1</sup> Where then shall the system of

<sup>1</sup> This may be illustrated by an example, and I intentionally choose the case that Savigny has given in his *System des heutigen Römischen Rechts* (i. § 8), because his celebrated work may be considered as containing the System in which the jural Relationships are predominant.—Two brothers

the Relationships of Right, find its close but in those particular Rights which constitute the unity of this multiplicity, otherwise so indeterminable by itself? It is indeed just these particular Rights which in their combinations, form the relationships of Right. In point of fact, the idea of adopting the relationships of Right as a thoroughgoing guide in the exposition of Right, has not yet been carried through; resort has been again had at certain points to the Rights themselves, although these have then been often designated Relations of Right.

All this is not to be understood as questioning the fact that there is a system of jural Relationships. There *is* such a system; but in following it, that indefinite tendency of certain modes of pursuing the relations has to be guarded against, as leading far beyond the real aim of the system.

## 22. Division of the Jural Relationships. Private Right ; Public Right ; Ecclesiastical Right.

Relationships of Right are relations of Persons to one another. These relations are infinitely varied and manifold, but they gather into certain organic complexes are subject to the paternal power; the one gives a loan to the other; they become heirs of their father; and the receiver of the loan pays it back. Can it be asserted that he has paid what he was not owing, and may he reclaim it under the *condictio indebiti*? (L. 38, D. De cond. indeb. 12. 6). Let us assume that one of the two brothers has been emancipated before the death of the father; or that he has his *peculium*, and he has not retained it; or that only one of them has become heir; or neither of them; or that the receiver of the loan had not yet paid; or that it was not a loan, but another transaction which they concluded, etc. In all these cases the relation of Right would become different; and it is evident that this may go on *ad infinitum*.

determined by the differences of the persons among whom they subsist. The System of the Relationships of Right, consists in the organization of these relations according to the qualities proper to the Persons that are the subjects of them.

The differences among men, are not all differences of Persons ; and hence they do not all give rise to really different jural Relationships. Personality is a common characteristic which is thinkable as subsisting equally in the most different individual circumstances. Indeed it is just the prominent manifestation of the principle of equality, as of that which belongs to all men notwithstanding their individual inequalities. As a Person, I find myself on an equality with my fellow-men, however they may otherwise differ from me in respect of talent, disposition, strength of body, or capacity of mind.

But there subsists a distinction among men, which affects the personality itself ; and it thereby produces a differentiation of Persons. This holds only of those qualities which rest upon the natural characteristics of all men, and which therefore give to their wills a determinate direction. Man is determined by his nature not only to act as an Individual, and to enter as such into relations with other Individuals, but also as the member of a Whole, to enter into relations with the other similar members of the same Whole. Neither of these determining qualities of his nature absorbs the other ; rather is it the case that neither of them can subsist without the other. All life depends on the union of individual and social activity, or of existing for oneself and also for others.

The Personality of man, and consequently his jural Relationships, are different, according as he is viewed in one or other of the following capacities :—

- I. As an Individual ;
- II. As a Member of an organic Society, which is—
  - A. The Family ;
  - B. The People ; or
  - C. The Church.

According to these distinctions, the jural Relationships are divided by reference to the Property of Individuals, to the Family, to the Public institutions of the People, and to the Church ; and Right itself is divided into—

- I. PRIVATE RIGHT (including the Rights of Property and of the Family) ;
- II. PUBLIC RIGHT ; and
- III. ECCLESIASTICAL RIGHT.

## I. PRIVATE RIGHT.

### INDIVIDUAL RIGHT.

#### 23. Man as an Individual. Things and Powers ; Property and Obligations ; The Legal Estate.

The jural Relationships in which man stands as an Individual, relate to the external goods which he needs for his existence. These goods—the earth, with what it produces and what man makes thereof — are primarily destined for the supply of the wants which he has as an individual, and their destination only receives a wider application by his becoming a member of the various social combinations. The division of these goods among individuals, and the rightful formation of the relations

into which men enter in connection with them, require regulation ; and this is the first task of Right.

The principle of Right does not deal with these external goods in all their natural multiplicity, but it brings into prominence their universal character as destined for man and his wants. This common characteristic is expressed by the word **THING**. A Thing is what is unconditionally subjected to the wants of men and absolutely at their disposal. A Thing has no independent destination in itself apart from man. Mediate, however, the Powers belonging to man are superadded to these external goods, by becoming connected with them through the activity put forth in acquiring and using them.

These goods are capable of being regarded from a jural and from an economic point of view ; and these two modes of regarding Things, are very different. The latter is directed towards the means of procuring them in such quality and quantity as will best correspond to our wants, and therefore it aims at improving and multiplying these external goods in themselves for our use. Right has only to consider their subjection under the Power of man, as a fact emanating from the operation of our jural freedom ; or, more particularly, it has to take account of their subjection under the Will of a person, and with regard to the position which others in virtue of their jural freedom occupy towards them. Whether this subjection happens to be economically advantageous or not, does not alter the decision of the question of Right in an individual case, although economic considerations will certainly have an influence on the formation of the general positions of Right. Such considerations bear upon requirements to which the formation of the institutions of Right must conform.

Man subjects a Thing to himself in order to satisfy the wants of his external life by means of it. He thus acquires power over Things. This power would by itself be a mere accidental fact, but when it is obtained by Right, and is recognised as pertaining to the Person, it becomes a rightful power, and constitutes a Right to the object. If I have a thing under my physical control, I possess it, and it serves my ends so long as I have the natural capability of maintaining this power over it ; yet so far this is merely a contingency of fact, and it is at best precarious in itself. But when it is declared by Right that the Thing belongs to me, this gives me a rightful, and not merely a physical, power over it. Thus it is made independent of the accident of possession, so that the thing is in my power even when not under my immediate physical control. This jural Power constitutes PROPERTY, which involves the right to demand a Thing from any one who withdraws and withholds the actual power over it, from its proprietor or Owner.

It may so happen that it is not important for us to have a Thing in that complete power and possession which is indicated by the term 'Property,' as a partial and limited power over it may suffice for our requirements. For example, I may wish only to enjoy the fruits of a thing for my lifetime, or to make some other merely partial use of it ; and this use, as not including the total destination of the thing, may coexist with a right of property in it on the part of another person. And this being so, it is likewise desirable to obtain for this partial use the same advantage as proprietorship gives, namely, the capability of making our right good against any one who may encroach upon it. It would manifestly be an excessive condition if I required to get a road to my

fields, that I should have to acquire the land that lay between them and the highway as my own property, when it might be of no other use to me ; and when the number of the people grows to be proportionate to the extent of the available external goods, such a condition becomes impracticable. It would be just as inconvenient, should I wish to secure to my widow the enjoyment of a certain property for her lifetime, that I could only do so on condition of taking it away from my natural heir and making her proprietor of it, so that I would only have a choice of giving more or less than was really my wish. Thus have arisen Rights to things which are not actually in the proprietary possession of the persons entitled to the benefit of them. A constituent part of the Property is here given to another ; and thus far it is separated from the ownership of it. These Rights have this in common with the property which is their source, that they are effective not merely against the Owner of the property who has granted them, but against all other persons.

The rise of these Rights in Things alongside of Ownership proper, as Rights in the Things of others, presupposes an advanced condition of the human race. It implies that the accumulation of men in the same place has diminished the superabundance of external goods, and induced circumspection in the economic utilization of them. It is but a further stage of this development which expands the relationships of Right that relate to man as an individual, beyond the immediate Rights to Things, and carries on this process of extending Rights through a wider range.

A condition of human society may be imagined in which the Right of Ownership completely suffices by itself for the jural Relationships in respect of external

goods. Every one lives with his family apart on his separate piece of land, and it supplies him with everything that his simple wants demand. The auxiliary powers which he needs are furnished by his own family, which is perhaps increased by the command of subjugated service. The human race soon advanced beyond these simple conditions. The individuals stepped out of their isolation, and a social intercourse arose directed towards procuring for the one the use or results of the powers of the other; and this proceeded upon a free standpoint, and was therefore reciprocal in its operation. As individuals had not all the goods, whether things or powers which they were in need of, at all times in their control, there thus arose the necessity of reciprocal assistance, and this condition was forthwith put under jural protection. Whoever did not possess certain goods, but had, on the other hand, a superfluity of others, would seek to procure the former by giving the latter in exchange for them. He would enter into relation with those who had what he wanted, and wanted what he had, either dealing directly with those who had a superfluity of what he wanted, or indirectly by means of persons who might undertake the business of commerce and thus form the medium of this mode of intercourse. Or if this did not suffice, he would ask the owner of the goods he needed, or of such as would be the means of procuring them, to entrust them to him on condition of his restoring them again. In this manner OBLIGATIONS arose. They would be Obligations for performances or for the doing of certain things on demand, giving rise to Rights called Claims. The sphere of Obligations, would be further widened by the possibility of infringements of Right among persons independent of each other. The

infringer or violator of Right, would be laid under Obligation to give compensation for the damage which his illegitimate act had wrongously inflicted.

Jural Relations of this kind increase in importance as human wants become more varied and refined, and the more widely the range of personal Freedom extends. Obligations will thus arise the more frequently that the need of the Powers of others is realized, and the more rarely that these powers can be commanded by a control of other Persons.

The sum-total of all those Rights of a Person which relate directly to external goods, constitutes the whole *Means* of his Legal *ESTATE*<sup>1</sup>. The Property is the Estate at rest and in stability; the Obligations are the Estate in movement and change. This distinction explains how, in the progress of the jural development, the Right of Obligations obtains always greater importance from Property being always drawn more into movement by the social intercourse. And thus there comes a time when it may appear necessary to check the advance of this movement by careful maintenance of the principle

<sup>1</sup> [The German term *Vermögen* is here rendered *Estate* as the best technical equivalent for it in English. The term in German indicates all the *powers* or *means* embodied in the whole Estate, as including both the actual Property and Obligations belonging to the individual. Savigny adopted it in this technical sense in his System, and in a Note he explains it thus: 'The German designation of this conception of Right (*Vermögensrecht*) is the most appropriate that could be found to express it. For by it the nature of the subject is immediately expressed as the *power* accruing to us by the existence of these Rights; it is what we have the power to do or are able (*vermögen*) to perform by means of them. The nature of the subject in question is less appropriately rendered by the Roman term *bona*, which has passed into the modern Romanic languages, and which primarily connotes the idea of the well-being that is obtained by such power, or the advantage which it brings to us' (*System*, i. 140).]

of Property against the excessive strength of this social tendency. The history of a People, like that of mankind at large, may be compared to a stone rolling down a hill; the velocity of its motion becomes at length immeasurably increased. Retardation by some check of the movement in question, may thus become necessary for the preservation of life, when the otherwise accelerated motion may become but nearer approach to destruction.

### FAMILY RIGHT.

#### 24. Man as the Member of a Family. Relation of the Family to Private Right and to the State and the Church.

The FAMILY, viewed as a natural union, formed independently of the Will, does not lie as such within the domain of right; it is properly a society of Men rather than of Persons. It appears at first sight even to be opposed to a jural formation of its special relationships, which are not thereby excluded from naturally organizing

M. Guenoux, in accordance with Savigny's remark, renders *Vermögen* by *biens*. *Avoir* is used by Ahrens in the same application. Mr. Justice Holloway represents *Vermögen* by *Potentiality*, and *Vermögensrecht* by *Potentiality's-law* (!). Mr. Rattigan keeps to the term *Property* (p. 177), which is manifestly inadequate. 'Estate,' as used above in connection with the term 'Means,' represents the idea of Savigny and Puchta with sufficient accuracy. It is thus taken in the wide sense in which it is defined in the Bankruptcy Act of 1856, as including 'every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt' (19 & 20 Vict. c. 79, § 4). 'Estate' is therefore used here as 'bona' in the Roman Law, for all that enters into a Universal Succession or 'hereditas.' Cf. Dig. 16. 208; 37. 1, 3.—  
[Tr.]

themselves. The Family embraces the whole existence of man, combined and undivided, in itself ; for the essence of Marriage, which is the foundation of its relationships, consists in the union of the two spouses in order thenceforth to live one life. Thus the jural conception, which aims at regarding man as the subject of Will, and at making this abstract quality dominate over the other characteristics of human nature, seems to contradict the nature of this relationship, as it is certain that a purely jural connection of the members of the Family with each other, would destroy the true life of the Family.

But just because this natural association affects the whole existence of man, it is not to be kept apart from the sphere of Right. Not that Right is to interfere in the ongoings of this circle of life, with usurpatory force ; on the contrary, it is the Family which presses into the domain of Right with the full energy of a system that is at once whole and firmly united in itself. And thus it comes directly under the influence of Right.

External goods primarily are given to men as individuals ; but their jural convictions cannot exclude the Family from the destination of the means of the Estate, as it is to the Family that the multiplication of mankind and the continuance of the race is entrusted. This is already involved in the oldest declaration of Right : 'Be fruitful, and multiply, and replenish the earth, and subdue it.' And the systems of Right of all nations recognise the fact, that when men acquire property for themselves, they also acquire it for their families ; it is only the jural form in which this thought is expressed that is different. Among every people we find this exhibited in the institution of *Inheritance*, as the Right of Succession, in accordance with which the Estate of a deceased person

passes to his survivors. The Estate remains for the family, and it is only the way in which this thought is carried out that varies. In many of the systems of Right, a more or less arbitrary settlement of the Succession is allowed on the part of the Testator; and thus the natural order in the transmission of the Estate, or parts of it, to the family, may be superseded.

The relations of the Estate to the Family, in addition to the Right of Inheritance, include the relationships of property between Husband and Wife, and between Parents and Children. Nor are these the only grounds upon which the Family enters into the domain of Right. The Family forms the connecting link between the Individual and the union of the People in the State; and the prosperity of this union as a whole, depends on the integrity of the life in the Family. For 'if a man know not how to rule his own house, how shall he take care of others; and how will one who does not reverence the correction of a father,' learn that habit of obedience upon which all jural order rests? Thus Marriage as the foundation of the Family, and the relation between Parents and Children, must become jural relationships, because they belong to the conditions of the jural order of life, and because Right must incorporate in its own domain all that is necessary for the security of its own existence. And as the Family stands in this relation to the State, it likewise stands in a similar relation to the Church, forming in like manner the connecting link between it and the Individual. The Family has thus to train its members for the society of the Church, as well as for that of the State.

We have distinguished a twofold jural relation of the Family; the one connects it with the rights of property

and obligations, and therein lies the signification of its bearing on Private Right; and the other connects it with the State and the Church. This latter relation therefore carries us into the further divisions of the jural relationships embraced under Public Right and Ecclesiastical Right.

## II. PUBLIC RIGHT.

### 25. The Union of the People and the Jural Form of the State; Constitutional Right and International Right.

The union of the People, like that of the Family, is a natural formation. It is therefore a union of Men as such, and not merely as Persons; in other words, it is not a Jural Relationship. But there is this great difference between the two, that the latter union, so far from involving in it anything opposed to the nature of Right, is such that the consciousness of Right is rather developed and maintained by it. The natural union of the People thus immediately assumes a jural form; it becomes an association of Persons, and as such we call it a STATE. The State has its natural basis in the union of the People, and what it superadds to this natural fact is the jural form which the elements of the whole people as a nation assume. The members of the People become citizens of the State; they are then regarded as Persons, and, in this particular connection, as Public Persons. The spiritual unity of the People is embodied in a Sovereignty. The natural inspiration of the members of the People, moving through the national spirit and will, takes form in rightful obedience to the Sovereignty. And the force of the spirit of the People throws itself

into the jural form of the Power of the State, which is exerted both inwardly and outwardly.

The Public Right, which gives jural form and character to the relationships in which man finds himself as the member of a State, thus refers either to the *internal* relations of the State or to its *external* relations.

### INTERNAL CONSTITUTIONAL RIGHT OF THE STATE.

Evolution of Forms of Government; Patriarchalism; Aristocratic Republicanism; Democracy; Monarchy; Feudalism.

In its direction inwards, Public Right determines first of all, *the Constitution of the State*; and this part of Public Right is usually called INTERNAL POLITICAL RIGHT. The Constitution of the State consists in the form given to the Organs in which the public activity is carried on, and in their relations to one another. The public activity within the State is, throughout its whole range, made up of a process of commanding and obeying; the Will which commands and is to be obeyed, is the Common Will upon which the political union rests, and this Will determines and limits all command and obedience in the State. The organ of command is the Sovereign; the organ of obedience is the Citizen, but the Citizen only obeys the whole State in the Sovereign, and in virtue of his being himself represented in it, he so far constitutes the Sovereignty.

Political Constitutions are distinguished mainly according to the form in which the sovereign power is embodied. The origin of their differences may be con-

ceived in this way. The Nation has arisen out of the Family, the expansion of the latter and its separation into distant branches having been the preparation for the former. So long as the consciousness of the family relationship prevailed throughout its various branches, the chief Head of the Family continued alone to be recognised as such, and his authority had still no jural character. As this consciousness disappeared, the recognition of authority did not pass away with it, but it began to assume a jural nature ; the Head of the Family was no longer regarded merely as the family head by the more remote branches, but was recognised as the Head of the People and their Sovereign, and with this fact the People became a political Body. Thus the Patriarchal Constitution was formed. It was akin and similar to the state of the Family, out of which it immediately arose. It was thus the oldest form of a political Constitution, and the others have been developed out of it. The Head of that family, which was regarded as the original stem of the whole people, was recognised in the patriarchal system as the supreme Head or Chief of all the families. But this most distinguished family might again become divided into several families, or it might become extinct, and then there would arise several claimants for the first rank. The Government would thus pass into the hands of several families and their heads ; and in this way an Aristocratico-republican form of Constitution would arise. These ruling families then appear as the specially active members of the Commonwealth, the rest of the people forming only an adjunct to them ; and they are kept as such in a passive position. This advance out of the early simplicity of the Patriarchal Constitution is, at the same time, the first impetus to a movement which

may be retarded but cannot be entirely kept in check. The key-stone of the old building is taken away with the removal of the one head, and the whole structure gradually crumbles down. The Aristocratic Constitution stands closest externally to the earlier patriarchal form, when the ruling families are able to resign themselves to the position of entrusting the actual leadership to one individual, along with whom the other Chiefs (*proceres*) have only a potential share in the Government; or if they have an active interest in it, it is still limited and subordinate. But when once the charm of natural subordination has been broken through, the result can only be that the feeling of equality with the ruling head will always tend to bring about greater limitation of his power; and if the supreme Ruler does not voluntarily yield to this tendency, a struggle between him and the aristocratic element will inevitably ensue. If the aristocratic influence triumphs, the Republican Constitution will obtain a complete form in the supremacy of the ruling families; and in connection with it the ruler will appear only as the Chief Magistrate. And now the pre-eminence in privilege of the ruling citizens, as a class, compared with the rest of the people, comes glaringly and sensitively to light. This also has to give way to the pressure upwards, to which the Constitution owed its existence. The great body of the people will continue in the state of political passivity assigned to them by the Nobles, only so long as the relations which have produced or favoured it are efficient enough to keep the Commons submissive to it, or to resist their striving after equality. From this pressure on the part of the Commons, a mixed Constitution may arise which will establish a balance between these elements of the State,

but it may also issue in a pure Democracy as government by the Commons. Such a Democracy will, in fact, be modified by the natural influences of wealth, education, and calling, which continually shoot forth new aristocratical elements. In the long run, Democracy delivers the people either into the hands of a foreign conqueror, or there arises within its own bounds amid the troubles and unrest of the many-headed government, a single ruler whom the usurpation upon which his power is grounded, transforms into a tyrant and an autocrat.

The ancient world was specially the theatre of the alternating changes and movements of these Political Constitutions. In modern times, under the supremacy of Teutonic races, Monarchy has obtained the preponderance, as a form of Government which has neither a patriarchal nor an usurpatory origin. The advantage which ought to be derived from this decided preponderance of the Monarchical Constitution is, that the question regarding the form of the sovereign power now assumes a subordinate relation, while the more important question regarding the nature of the power itself and its exercise properly and characteristically takes the first place.

The most general characteristic of Monarchy as a form of Government, is that the idea of the sovereignty is embodied in the prince, so that all sovereign power is regarded as proceeding in its action from him; and if others exercise this power, they only do it in his name, whether its exercise is entrusted by a contract, or proceeds under some other jural form.

But this does not yet exhaust the idea of what is contained in a Monarchy; for so much may be conceived in connection with the Chief Magistrate of a Republic

who exercises the sovereign power in the name of all the citizens, while the various other officials are regarded as his commissioned representatives. The peculiarity of a Monarchy is that the prince himself exercises the sovereign power *in his own name*; and it is implied that he possesses this authority *as a right* which belongs to him. The fact that he thus exercises the sovereign power in his own name, distinguishes a monarch from a republican magistrate and from any official; the fact that this authority belongs to him as a right, further distinguishes him from any such official, and from a usurper; and the fact that this right has a purely jural origin, distinguishes him from the patriarchal ruler.

Monarchy is, therefore, the sovereign power embodied as the right of a Person. The nature of the right is to be determined from this essential characteristic of it, and hence it is eminently a Public Right. It therefore belongs to the prince as a Public Person, and only in so far as he can be regarded as a member of the State in connection with its other members. The relationship between a Monarch and his Subjects, is a reciprocal relationship; it is not conceivable without the recognition of the Subjects as being also Public Persons and possessors of public rights. We may express the essence of this relationship as consisting of a reciprocal allegiance and fidelity in the interest of the function which has to be discharged by the State; it implies allegiance and fidelity in the government by the prince, and allegiance and fidelity in the obedience of the subjects. The question then comes to be how to find the proper jural form for this constitutional idea, so as rightly to embody it and provide for its protection.

The Feudal nexus supplied such a jural form. It was

constituted by the relationship of property, which, however, included a personal connection between all those who were embraced in this relationship by the tenure of feudal service. The constitution founded upon Feudalism was a free constitution, if by 'free' is meant one in which the ruler, even in his political position, is not merely a ruler, nor the subject is merely one under his authority, but both are at the same time qualified in their respective positions by their own rights. The vassal had a right to fidelity in the person of his over-lord; and as this bond was carried on in analogous collateral relationships, the lowest member of the Commonwealth stood in a political connection with its Head, and was at least indirectly free. The world has outgrown this political vesture, with its mingling of the ideas of public and private right, and its application of the conception of property to public relations. The feudal system was suitable only for the simpler states of society, and for more limited requirements than those which we inherit at the present day.

The constitutional problem now is, how to bring the relation between princes and subjects into a form of right so as to maintain its jural purity, and yet to lay aside certain traditions connected with the family and with private right. This jural form must be adapted so as to embrace the whole elements of the relationship. It is therefore a form of dominion over persons; and in particular, it is the dominion which may belong to a Public Person over public persons, so that its character shall only relate to this quality of the persons in question. But no dominion over persons can be an absolute, unqualified dominion; for in this it is specifically distinguished from the dominion over things. The Subjects

therefore stand as persons under the monarchical Power ; and consequently they are regarded as possessing rights. And, on the other hand, the Monarch has not merely rights over his subjects, but duties towards them as such. The limit of power in the monarchy which this involves, may be expressed generally by saying that this power is only the sovereign power, and the obedience of the subjects to the monarch is obedience to the sovereignty.

A remarkable and yet a very prevalent mistake is to give the character of a *private* right to this relationship. This is the common error of two great political parties, otherwise directly opposed to each other. The one party gives the character of a private right to the right of the monarch, by regarding it either as analogous to the paternal power, or as a form of guardianship, if not even of ownership. The other party treats the right of the subjects as a private right, by ascribing it to every individual as such, and so regarding the individuals by themselves, or in any associations organized by them at will, as entitled to offer resistance to the government, and to take an active part in its functions. Public freedom being thus transformed into private arbitrariness, comes to be suppressed when it opposes an energetic government ; and when it rises against a weak government, it triumphs at the cost of that real freedom which is inseparable from the well-being of the whole community. Public rights belong to persons only as members of the Commonwealth, and in it as such. Nothing is more essential to the full prosperity of a State than that this feeling of the citizen with regard to his public right be kept continually alive, and that in his exercise of these public rights, it be not suppressed by the tendency to individual isolation. In the greater States, the public

Corporations serve this purpose in so far as the citizen exercises his public rights as a member of such Corporations, and his connection with the remoter whole is thus directly maintained. These Corporations again are capable of subordinate organization ; and in an extensive Empire this is advisable, so that the lesser Corporations may be united into greater unions, or combinations, or ranks (*status*). By such means an assembly representing the whole of the citizens in the Empire, and practically exercising their rights, may thus really be formed.

#### **The Sovereign Function and the Jural Order. Administration of Justice ; Civil and Criminal Process ; Police.**

Public Right has further to determine the function of the Sovereignty, and the mode in which it has to be actively carried out. The Sovereign requires assistants in the performance of this activity ; and the exercise of certain functions has to be assigned to them as an office which they have to administer in his name. The obedience of the official to the Sovereign of the State, is of another kind than that of the citizen ; it is like the obedience of a servant to his master. But it is also limited, especially by reference to the nature of the service which the official has undertaken. This becomes especially important in the case of those officials who are entrusted with the administration of Right which, in well-ordered monarchies, proceeds in the name of the monarch, but without his immediate influence upon the decision of the individual cases.

Opinions differ regarding the function of the Sovereignty and the range of its action ; or, as it is commonly expressed, regarding the Ends of the State. All theories,

however, agree in holding that the maintenance of right-ful order is a function of the State ; the only question in dispute, is as to whether the State has other and further independent Ends. We shall look, first of all, at that function which is universally recognised.

The public activity which is directed towards the maintenance of jural Order, is partly direct and partly indirect.

The activity which aims directly at realizing that object, may be indicated as the application of the rules of Right to the relationships which have to be determined by them. This application of right presupposes two things : (1) The certainty of the jural Rules ; and (2) adjudication of the Relationships in accordance therewith, so as to bring these relationships and rules into harmony with each other. In the former connection, it may become requisite to remove uncertainty regarding the common jural conviction by expressly establishing a principle of Right. This is the function of Legislation which has been discussed above.<sup>1</sup>

It is the function of the judicial activity to bring the existing Relationships into harmony with what Right demands. Its interference presupposes a disturbance of the harmony of these Relationships with Right ; it implies a discord between fact and justice, constituting a wrong which the judge has to remove. The actions which are necessary to the attainment of this end, constitute the JUDICIAL PROCESSES ; and the form, order, and signification of these Processes, are prescribed by laws which regulate the procedure of Justice.

The Wrong by which a Judicial Process is occasioned, may be either *relative* or *absolute* ; and the Process itself is, accordingly, twofold. It is possible that the Wrong

<sup>1</sup> § 14.

may consist merely of a violation of rights whose existence can be disputed generally, or only to a certain extent in the Case. The performance of an act, or the failing to perform it on the part of some one, is qualified by another as a violation of his right in such a case ; and it is only so far contrary to Right as a right belongs to him who alleges that he is injured, either generally or to the extent averred, and this assertion of a right may be called in question by the opposite party. Thus, if any one asserts that the present possessor of a certain thing, infringes his ownership of this thing by such possession, or that some other one violates the claim which he has to a certain sum of money by refusing to pay it, a legal case would arise. We may call such a disputed case one of *relative Wrong* ; it is a wrong which assumes the appearance of a right. The opponent who refuses to recognise the claims in question, affirms that he himself is the true subject of the right. There thus arises a dispute about a right, which has to be decided by the judge. The procedure which has for its object the decision of controverted questions of right, and consequently the removal of such relative wrongs, is a *Civil Process*. The term 'Civil Process' is usually limited to disputes about private rights, but this is an arbitrary limitation. All rights whose existence can be contested, and whose infringement, therefore, bears the character of a relative wrong, whether they be Private Rights or Public Rights, have to be vindicated by means of a Civil Process, if the constitution of the State has not withdrawn its protection from these rights, by not recognising any authority as competent to determine such disputes about them.

The wrong in question may also be an *absolute wrong*. This is the case when it is a violation not merely of

rights whose existence can be questioned, but of Right generally; and as such it is a breach of the whole order of Right. Such a wrong is called a Crime. A Crime presupposes two things:—first, that the will of the doer of it has set itself in opposition to Right, and has put itself above right; and, secondly, that certain rights have been violated by his action. This second requisite of a Crime as a violation of right, contains again two elements: an *objective* element, which consists in the invasion of an external sphere of right, and a *subjective* element, which implies that the fact in question has been caused by the action of the individual himself, and not merely by an external influence but by the will of the doer of the action. This may be otherwise expressed by saying, that the violation of Right is an injury which must be imputed to him who commits it. This Imputation must not be confounded with the first requisite essential to the crime as contained in the direction of the will to the wrong; for it may exist without this. In this bearing there is a distinction to be noted, according as indisputable rights are violated which affect the existence of a person, or rights whose violation could only constitute a relative wrong. In the former case, along with the imputation the first requisite of a crime is also included; for the will of the doer of such an action could not but be criminal. In the latter case, the imputation does not in any way decide about the existence of the first requisite of a crime. Thus, if I take away a thing from another, and thereby violate his right, this violation of right may be imputed to me, although my will may perhaps have not been directed to the wrong; and, therefore, this infringement of right need not be regarded as a crime.

The restoration of jural order when disturbed by the Crime, takes place through the Punishment of the criminal. The law of right which prescribes this punishment, and which, therefore, defines crimes and their penalties generally, is called a Criminal or Penal Law. It is a part of the Public Right, because it applies to man in his relation to the whole community to which he has opposed himself as a criminal. The judicial procedure, which has for its object the punishment of the criminal, and which is distinguished by this purpose from the civil process, is called the *Criminal Process*. We find, however, that Criminal Law and Procedure, are not always carried out in practice as far as the conception of absolute wrong extends. Many a wrong which shows itself to be absolute, is treated as a merely relative wrong, and is prosecuted only by means of a Civil Process. This divergence from the rule of Right, may be founded upon imperfection in the jural insight of the people ; but in course of the development of their consciousness of Right, it will become more conformable to it. Sometimes, moreover, the boundaries between these two classes of wrongs, although exactly recognised in idea, are nevertheless difficult to determine in individual cases ; and thus the laxer treatment of absolute wrongs as relative, comes to be preferred. Or again, it may be a regard to the external consequence of the wrong, when this is found to be of relatively less importance, that gives occasion to such a deviation from the principle by which the distinction between wrongs is determined.

Thus far, account has only been taken of the judicial office of the sovereign power as an activity immediately directed to the maintenance of rightful order. But this does not exhaust its proper functions. Order in the

sphere of Right, is rooted in the sense of Right which permeates the Life of the people; and were it not maintained by this influence, the administration of Justice would have but a very precarious effect. This is evident when we consider that the exercise of the judicial office requires men whose sense of Right cannot be guaranteed merely by the judicial institutions. But even apart from this consideration, it must be admitted that if the mass of the people, as the predominating majority, were influenced merely by the threat of coercion or of punishment, the Courts of Justice would soon be quite inadequate for their function, and a State that had sunk into such a social condition would hardly deserve to be called a State. It lies, therefore, within the function of the Sovereign Power to train the individuals entrusted to its care to that common sense of Right which is the spiritual condition of their becoming real citizens; and consequently care must be devoted to their intellectual, moral, and religious culture, without which their proper civil training is impossible. In like manner, the sovereign Power has to direct its efforts towards the increase of the material prosperity of the citizens, not merely in so far as in their spiritual culture there lies a guarantee against disturbances of the public order within the State, but also because this material prosperity furnishes at the same time the means required for supporting the existence of the State in itself, and for maintaining its position in its external relations.

This care for the spiritual and material well-being of the citizens, constitutes the POLICE-FUNCTIONS of the State. It is primarily of a *protective* character, for it is evident that the education of the individual by means of the family and the church, and the instruction communicated

by speech or writing that emanates from individuals or corporations, as well as the industrial enterprises in their own sphere, may all encounter obstacles, the removal of which not only lies within the power of the Sovereign authority, but even becomes a duty. This function, however, has also a positive influence upon these spiritual and material interests, in so far as they are common to the whole people and affect individuals as members of the State; and these relations cannot be separated from them.

It is difficult to determine by general rules how far 'positive' interference on the part of the Government with such interests, should or may go. A mere *laissez faire* policy may be driven too far, and under certain circumstances may even become prejudicial to the State. An excessive activity of the Government in the way of Guardianship, is almost always so. A guarantee against this latter extreme, will be furnished by the Supreme Power keeping in view the maintenance of rightful order as its proper aim, and regarding such *positive* activity as only to be exerted indirectly for the attainment of that end.

The function of the Supreme Power would certainly be exhibited in a simpler way, at least theoretically, if the view so zealously maintained by many politicians were correct, that the State includes completely in itself the whole of the destination of man, or at least his whole earthly destination. According to this view, the action of the Government would have no limit whatever, except what was practically impossible, in carrying out and satisfying this unlimited vocation. To regard the individual as a member of the State, would thus be to view and deal with him in *all* his relations. But this theory receives a practical refutation in the very fact that it has

only arisen out of isolated speculations or the unlimited ambition of individuals, and is decisively rejected by the practical sense of all nations.

### INTERNATIONAL RIGHT AS EXTERNAL POLITICAL RIGHT.

The external side of the State, is presented in its relations to other States. The relationships into which the individuals who belong to different peoples enter with one another, are *public* relations in so far as they arise out of the fact of their being members of different States, whereas the commercial intercourse carried on between different nations, is primarily a *private* relationship in so far as those who carry it on are regarded merely as individuals. But when a special protection is vouchsafed to the foreign merchant because he is the citizen of a certain State, the commercial intercourse becomes a Public relationship; it is a mode of intercourse between the States so that these States themselves appear in their members as Persons. The Right which determines these relationships to other States, and which regulates the action of a State in regard to them, is constituted from the standpoint of the several States. The constitution and maintenance of these relationships are, therefore, at the same time directed towards the preservation of the independent existence of each State, and this forms the external Right of the State in its foreign relations. Moreover, as all the States which stand in such relations to each other, recognise certain principles of Right upon which these relations rest, there thus arises a System of International Right. The essence of this International Right, lies in the fact that the personality of the several

States is recognised by it; and their co-operation in respect of reciprocal rights, is thereby guaranteed. The actual execution of what is prescribed by International Right against a relative or absolute wrong that has arisen between one State and another, is primarily left to the individual resources of the injured State so far as its own power goes; and it is therefore of a precarious nature. But it is expected that the power of the weaker State will under certain circumstances be supplemented by the power of other States, according as they are driven to furnish this help, partly from the feeling of Right, and partly from a regard to their own interests.

#### TRANSITION TO ECCLESIASTICAL RIGHT.

The State further stands in an entirely peculiar relation to the Church, which is at once in it and out of it. The different States are political unions similar in kind but separated by external boundaries; the State and the Church are not separated by the distinction of external territory, but by the dissimilarity of their nature. They involve, however, a relation to each other. The State obtains from the Church the education of its citizens into obedience to the Divine Law, which is the true foundation of obedience to the sovereign authority as the 'servant of God,' as also of the fidelity of the rulers in their calling; and, on the other hand, the Church obtains from the State the external protection of its rightful existence. The rights of the State in relation to the Church, and their limits as determined by its proper function and the independence of the Church, thus belong to another division of Public Right, which is called *Ecclesiastical Right*.

### III. ECCLESIASTICAL RIGHT.

#### 26. The Nature and Forms of Ecclesiastical Right.

Besides the natural connections of man in the Family and the People, he is also determined to a supernatural relation which leads him above his earthly existence, and up to God. Religion, as essentially a common consciousness of God, manifests its existence in the union of those who share in this consciousness. The community of Believers thus formed, is not an accidental thing; it is involved in the very nature of Religion.

There are certain national Religions; and in these the religious union coincides with the national and political union. There is therefore no association different from that of the People and the State produced by these Religions.

On the other hand, Christianity is to be regarded as the religion that has been freed from mere national limitations; and its manifestation in the communion of those who profess it, must therefore correspond to this its essential character. The union constituted by the Christian Religion, must thus have an independent existence of its own in relation to the separate Peoples and States. The idea of the Church rests upon this inherent independence.

The Romans regarded the *jus sacrum* only as a part of the *jus publicum*; and this was entirely conformable to the character of their Religion. On the contrary, the Right embodied in the Christian Church, appears as essentially a third branch of Right, in addition to Private Right and Public Right.

The Church is the community formed by all believers. It has been made a visible community by Christ Himself, through the command to proclaim the divine Word in it, and by the institution of the Sacraments. It is the visible representation of 'the Kingdom of God upon earth.'<sup>1</sup>

Now this union receives a jural form; and the Church in the spiritual sense, thus becomes a Church in the jural sense, just as the union of the people receives a political form and becomes a State. This step is as little arbitrary in the one case as in the other. The essential nature of the spiritual Church, in so far as it is a union of men, leads of itself to this jural formation of it.

The Church rests upon the common faith, and upon its own forms of action. It is love to God, with the love through Him to the brethren, which cares for the eternal and temporal weal of the brethren; and it manifests itself through Doctrine, Prayer, the Sacraments, and the Cure of souls. The actions that are grounded in Faith and in Love, and which proceed in the consciousness of fellowship with God and the brethren, make up the Christian Worship. Every member of the Church who performs an act of worship in the consciousness of this fellowship, is a representative of the Christian communion; he recognises himself as a member of the Church, and the others recognise this act as proceeding from the whole Body which they form with him in common. The Church itself is thus active in her members, so that *their* actions are *her* acts. Certain ecclesiastical organs are

<sup>1</sup> [That is, in so far as the Spirit of its Founder has not departed from it, or as the internal corruption into which it may have fallen by sin against that Spirit has been overcome. Otherwise, the Kingdom of God is only where that Spirit is; and where it *was*, only the framework of the ecclesiastical institution remains.—RUDORFF.]

established in order to make the uninterrupted activity of the Church on all its sides, independent of accident, and to keep alive the consciousness of communion. To these the activity of the Church is entrusted as their special function ; and each in a certain sphere, represents the community by right. These organs are, first of all, the Congregations into which the Church is articulated, so that every member of the Church shall find himself in such a congregation, and may be active in it for the whole community, while all the Churches together by right exhibit the whole Church. The other organic Institutions are formed by the Ecclesiastical Offices as forms of ministry in the Church and the Congregations, directed to the various modes of ecclesiastical activity in Doctrine, Sacraments and Pastorate, either immediately by direct personal exercise of them, or mediately by supervision of them and provision for their maintenance.

This representation of the Church by its Congregations and Ecclesiastical Offices, gives the Church its jural form. It gives the objects of Ecclesiastical Right which has to determine the conditions of the establishment and operation of these Institutions, and at the same time to regulate the membership of the Church as personal participation in this jural order. The question is thus determined as to who is to be regarded as by right a member of the Church.

Ecclesiastical Right is to be distinguished into the *internal* and the *external* Right of the Church. The latter determines the relations of the Church to the State ; and, where several Churches exist alongside of each other, it has also to determine the relationships of any one Church to all the rest.

## 27. The Relationships of Right as Members of an Organism.

The foregoing exposition has shown how the relations of Persons divide according to their respective positions in the social union, and how they become connected into separate masses as Private Relationships, Public Relationships, and Ecclesiastical Relationships. It has been further seen how the Right which regulates these Relationships becomes divided into three corresponding departments, as Private Right, Public Right, and Ecclesiastical Right, and that each of these has its own peculiar function. Further, they all stand as members of one organism, not merely under one Principle equally involved in them as the principle of Personality in actual operation, but they are, in various ways, linked into connection with one another. The Family acts upon the means of the private Estate by entering into relation with it, and this cannot take place without a reaction of the relationships of Property upon the formations of the Family. Again, the State and the Church act upon the Family and upon the relationship of Property, by giving to the family a special political and ecclesiastical vocation, and assigning to property a destination for ecclesiastical and political ends.

There may be, however, an abnormal Encroachment of the principle of one department of the sphere of Right upon that of another. In man there is a tendency to refer the external world not merely to himself as a Person, by which Right as such obtains its material, but more particularly to refer it to himself as an individual. If this impulse is not controlled, it gives rise to an abnormal influence of the principle of Private Right in the sphere

of Public Right, such as is shown by Despotism on the one hand, and by the striving after unlimited individual freedom on the other.

Such an encroachment, by giving the upper hand to one principle in the domain of another, will always issue in a result that is prejudicial to both ; each of them being weakened in its own sphere in the proportion in which it becomes powerful in the other. This is seen in the case of Despotism which is founded on the conception of the supreme power as a private right, whereby it becomes conjoined with insecurity of what are really private rights, from their being thus exposed to the arbitrary attacks of the political power. The same result usually follows the ascendancy of revolutionary sentiments.

It is otherwise when the principles of Private and Public Right are mixed up merely in the natural movement of their gradual development, and when they are really advancing towards mutual distinction. In such circumstances, their state of combination is to be regarded as a mere stage of transition, and as bearing in itself the germ of advance to purification. In this light we have to regard the mixture of the notions of political and private Right, which are contained in the Feudal System, as an earlier stage in the formation of the modern State. But such an apology cannot be claimed for the view taken of the sovereign power as a private right of property in the land and people ; for, while the Feudal Constitution was an expression of the monarchy corresponding to its relations in an earlier period, such a view of the supreme power has never been conformable either to the nature of monarchy or to any other political constitution.

**B.—SYSTEM OF RIGHTS.****28. Right; Personality; Jural Capacity; Natural and Juridical Persons.**

Right makes man a Person, and determines his activity as a Person. Personality is thus the possibility of a jural Will regarded as the quality of a subject. The same conception is also indicated by the expression 'Jural Capacity' or 'Capacity of Right.' Right brings this capacity, which belongs equally to all men, into prominence; it gives it the first place in its sphere, and subjects the differences of individuals to it. Right thus controls the manifold material which is presented by the inequalities of men in race, sex, age, corporeal powers, and natural dependency, by reducing them under the principle of Equality. But by the reaction of these material conditions, a certain multiplicity is introduced into the jural form itself. These natural relations cannot be ignored by the principle of Right, since they form the very material upon which it has to operate; nor, on the other hand, can it abolish them so as to carry out the absolute equality of Persons.

The conception of Personality thus admits a recognition of different stages, as constituted by different classes of persons with a different capacity of right. Right, accordingly, in order to satisfy these individual considerations, and to incorporate them into itself, assigns to certain men limitations of Personality. It controls the natural inequalities of men, by making them inequalities of Persons as such. This tendency of the power of external things, has misled several peoples in their

systems of Right so far as entirely to refuse to recognise personality in many individuals.

On the other hand, in order to give to certain relationships a jural form conformable to their nature, the principle of Right has passed beyond the individual man as the natural subject of Personality, and has created other persons besides individuals, called 'Juristic' or 'Juridical Persons.'<sup>1</sup>

There are goods which are destined not for the purposes of man as an individual, but for a number of individuals united together as in a Corporation. Who then is to be regarded as the Person to whom these goods belong? Is it all the individual persons who form the Corporation, each up to a certain part? This certainly would not correspond to the nature of the relationship, since the goods in question are not destined for the individuals as such, but for them as members of the whole union, or for the whole Corporation. To say that the individuals are the owners, would give to these goods a different character from what they are meant to have; and it would likewise be dangerous, for the attainment of the ends in view, to lend the individuals, as individuals, power over them. The only view that is conformable to the nature of the thing, when the goods are assigned to the union or corporation as a whole, is therefore that according to which the union or corporation is regarded as an invisible 'Juridical Person,' quite different from the Natural Persons who form its membership.

Personality differs according to the departments of Right that rest upon the differences in the positions of the

<sup>1</sup> [The term 'Juridical' is preferred to 'Juristic' in this connection, as a better contrast to 'Natural,' and as also distinct from 'Jural' and 'Juristic,' as used above.—TR.]

individual, and of his relationships as determined thereby. There is thus Private Personality, Public Personality, and Ecclesiastical Personality. The rule is, that the individual may unite equally in himself all these personalities, but that according to the different nature of the relationships whose jural determination is in question, the one or the other may only come into consideration. Now, in each of these aspects of Personality, the inequality of persons referred to, may appear; and the individual, whether regarded as a private person, as a public person, or as an ecclesiastical person, may have a full or limited jural capacity. And in like manner, it is also possible that he may occupy in relation to one aspect a higher stage, and a lower stage in relation to another; or he may be entirely devoid of Personality so far as such a relation is concerned.

#### 29. The basis of the System of Rights; Guarantee of Rights; Wrongs as Violations of Rights; Protection of Rights by Self-help and by Courts; Actions.

Personality, as the possibility of a jural will, comes into action by the person obtaining a real power over an object, and this constitutes a Right in it. According to the difference by which the person is distinguished as the subject of such a Right, all rights may be arranged as private rights, public rights, and ecclesiastical rights.

Right may be regarded as the power which the Common Will gives to a person over an object. It is not sufficient to guarantee the jural power over the object, without giving likewise actual power over it; rather does Right require the union of the two. Hence, the separation of them, so as to give the existence of a jural

power from which the actual power is withdrawn, or the existence of an actual power to which no jural power corresponds, constitutes a Wrong ; and against it rights must be protected, if Right is to have reality. The actual power over an object, may also be regarded as the exercise of the jural power as a right over it. A right is therefore violated when its exercise is hindered, in whole or in part, by other persons. The violation of a right, invokes the protection of the right ; and the end of this protection, is the restoration of the exercise of the right which has been hindered. The person who has been violated in his right, has to be put again into the condition in which he would be, had no such violation occurred. Protection against violations of right, is an essential requisite for maintaining the existence of a right ; it may vary in its degree of imperfection or perfection, but no right is conceivable without some protection.

The restoration in question may take place voluntarily, by the action of him who violates the right when he has come to the knowledge of the wrong he has committed. But if this alone were relied on, rights would have an extremely precarious existence. There must be means of bringing about the restoration required that are independent of the judgment and goodwill of the individual, and of enforcing it as a matter of right. Hence an important element is added to the conception of a right, in the implied necessity of its protection. A right can only be that kind of power which can be exercised by some mode of compulsion ; and only so far as this is possible, has power over an object the character of a right.

One means of attaining to this restoration, and of

carrying out the exercise of Right against any one who violates it, is presented first of all in the power of the subject of the right himself; that is, in the self-help of the individual. This means of vindicating Right, is both questionable and inadequate. It is questionable, because the party himself is usually unable to estimate correctly the limits of his own right and the wrong of his opponent; or, if his knowledge is not awanting, interest and passion will commonly make him outstrip the proper limits of its execution. Moreover, the right of the person who alleges the injury, is contested by the opposite party, so that a decision on the question is the chief thing required; and this must be given unquestionably by a third impartial party. Again, the means referred to is inadequate, because, in order to succeed, it assumes that the party in the right will be always the stronger.

It would be a decided imperfection if the realization of right were made to rest upon such individual contingencies. We have seen that one department of Right, namely, International Right, suffers from this defect; it is as such an imperfect part of our jural structure, and it should remind us that our right is limited, and that there is a limit beyond which wrong may become too powerful for right itself, so that it requires a higher aid. But it would not be justifiable to transfer this inadequate condition to the internal relations of the States, which would happen were the public rights of the citizens to remain without judicial protection, and were the members of the Commonwealth to be put in consequence on the same footing towards each other as the separate peoples are. The means of maintaining Right by self-help, cannot be favoured or encouraged in any well-ordered institution of Right. It is not to be absolutely excluded

from such a state of things; but it has to be limited merely to the maintenance of an actual present state and prevention of its change. It is to be so limited, however, by a protection that is to be sought from the constitutional organ of the Common Will. As the protection of Right generally against crime, constitutes one of the chief functions of the Supreme Power, so does the protection of rights against relative wrongs also belong to it. In behoof of the restoration required, there is connected with the rights in question the possibility of calling for judicial aid, on account of their violation, and of thus establishing these rights before a tribunal, and demanding the restoration of the condition of things that existed before they were violated. The process by which such judicial protection is invoked, takes the form of 'Actions' and 'Defences.' An 'Action' is the process by which one who alleges a violation of his rights, brings his case before the judge for decision, and invokes his aid. Over against the raiser of the 'Action' (*actor*), who, as the Complainant, Plaintiff, or Pursuer, is consequently the beginner of the process, stands the Defender or Respondent, as the person accused (*reus*), who defends himself against the allegation or claim. His defence may be made by Denial, or Negation of the alleged ground of the case; or it may be done by Exceptions to it, in which he may assert that, even if the claim of the raiser of the Action were well founded, he is to be absolved or assoilzied from its conclusions on special grounds. Thus, if a plaintiff or pursuer, as the owner of a thing in the possession of the defender, demands its delivery, the defender may deny the ownership of the pursuer; or he may admit this, and yet allege a right in his favour which justifies him in retaining possession of the thing,

although belonging to the pursuer; and so he may refuse to surrender it. In the former case, he defends himself by Negation; in the latter, by Exception. On the other hand, the pursuer may maintain his claim against such an Exception either by Negation or by a Counter-exception; and this is called Replication or Counter-plea. Again, a Duplication may be further opposed to this on the part of the defender, and so on. These legal acts may be looked at from the point of view of their possibility; and the same forms of expression as to Action and Exception, are used in reference to the *possibility* of instituting or defending a process. The right of Action in this sense, constitutes an element in the system of Right which is thus brought into force; and this right forms the foundation of the Action. The foundation of Exception in defence, is either a right on the part of the defender, or some other circumstance by which he asserts that he ought to be freed from the claim of the pursuer, altogether or for the present. Further, the occasion of the Action is to be distinguished from the grounds of it. The *occasion* in the case of an Action, is the violation of the right of the pursuer. In reference to the defence, it is the institution of the suit; and in reference to a replication, it is the allegation averred.

### 30. Division of Rights by Relation to their Objects into Rights in Things, Rights in Persons, and Rights in Actions.

Every right is a power over an object; and every right must have an object which in virtue of this right is subjected to the jural will. Moreover, every such object

must be so constituted that the actual power corresponding to the jural power, may be capable of being carried out compulsorily against any violation of it.

The objects of the human will, which as such are capable of jural subjection, have endless individual differences. What variety there is in the corporeal things, lifeless or living, which are assigned to the dominion of man! The difference in their natural qualities is great, and it is much increased by artificial modification of them for human wants.

Now in all these objects, the principle of Right brings into prominence what is common to them, namely, that they are objects jurally subjected to us; and so far they are equal as regards Right. But as Right generally does not abolish individual inequalities, but only controls them, these differences have also a validity of their own and react upon Right. The jural power receives a different qualification through the difference of its objects, although all their individual differences have not this influence upon the jural form which controls them.

The nature of these objects furnishes the basis of the multiplicity of Rights, just as the natural distinctions among men form the foundation of their difference as Persons. The effect of this natural operation of things upon the sphere of freedom, is to give Right the rational character and the necessary connection by which it becomes a System. The System of Rights thus rests upon the determining influence which Objects have upon them.

1. The first class of objects upon which jural power is directed, is given in the Corporeal Objects that are external to man, to dominion over which man was called by the oldest law of Right (Gen. i. 26). These are called

THINGS. However different they may otherwise be, this name indicates the element common to them all, of their complete surrender to the dominion of Right. The jural subjection of such objects gives rise to RIGHTS IN THINGS, which are also called REAL RIGHTS. A Right in a Thing is always the same in kind, whether it refers to the ground and the soil, or to an animal, a plant, a stone, and so forth. The natural difference of objects, however, exercises an influence upon Rights, so far as it can be regarded as a difference of the things themselves; that is, as a difference of them on the side on which they are related to Right. Hence Right makes a distinction between Movable and Immovable Rights,—between fields and buildings, tame and wild beasts, and such like,—while it is quite indifferent so far as Right is concerned to what Natural Class of things an animal or such like may belong. The influence which the differences of things have upon Right, may relate either to the origin and maintenance of the rights in these Things, or to the nature of the Rights themselves. This holds not merely in that certain rights only are assumed in respect of certain kinds of Things, but in that certain Things alone are recognised as the unconditional objects of full human dominion with all its consequences. This is shown, for instance, in those forms of legislation which refuse to ownership in Movables, total and undisturbed proprietary protection. Of more universal importance is the difference that is presented by every individual Thing as to jural subjection, that it may be subjected either *completely*, or only *partially* by reference to a particular side of it on which it has some particular value to man. This is illustrated by the fruit which may be obtained from an object, or the use which may be made of it. In the case

of total power over a Thing, we say the thing belongs to me or is *my own (res mea est)*; and in the other case only some particular side of the thing belongs to me as usufruct (*usus fructus meus est*), and we have a right thus far to a Thing that is owned by another.

2. The second class of the objects of Right, is constituted by Persons. Hence RIGHTS IN PERSONS, by the nature of their objects, are different from Rights in Things. Some Rights in Persons have received in the systems of various peoples a form analogous to Rights in Things, but this has had its ground only in the fact that the position of certain persons has been treated as analogous to the destination of things. This assimilation, where it has gone farthest, has taken these persons even out of the class of Persons, and put them into that of Things. This was the case with the Slaves in the Roman Empire; and in the earliest period of the Roman Law, the same idea of right brought the condition of Children, even in their private relation under the paternal power, very near to this position by regarding them as parts of the paternal Estate. And even the latest Roman Law, although it greatly limited this principle in application, did not entirely give it up. In the sphere of Public Right, despotic constitutions have made the sovereign power, which is a right in Persons, similar to a right in property, by an analogous assimilation of men to things.

The subjection of one Person to another by right, can never be so complete as in the case of a Thing. Under a total dominion, a Person would no longer be the subject of jural freedom; and he would therefore cease to be a Person. Every right in a person is, therefore, a limited form of power; it is the control of only a certain side of the person. This includes the possibility of a reciprocal

power existing between persons. Thus Conjugal Right is a right on the part of each spouse in the person of the other; and it applies to the conjugal life so far as it admits of a jural form. In like manner, in the case of Parental Right, in the person of the Children there is a corresponding right of the children in the person of the Parents. To the right of a Prince in the person of the Subjects, there is similarly a corresponding right of the Subjects in the person of the Prince. So in like manner, an Heir who has as such a right in the person of a Testator, is at the same time determined and controlled by the personality of the Testator. This view, which follows from the impossibility of the total subjection of one person to another, seems somewhat strange to our modern jurists, merely because they apply to the conception of Personal Right the standard of the Roman *patria potestas*, or similar criteria which are certainly one-sided. But this one-sidedness arises only from the anomalous intermixture of the character of a Real Right, by which the nature of Personal Right is obscured. Instead of questioning the quality of Conjugal Right as a Personal Right, because it pertains not merely to the husband as Right in the wife, but also to the wife as Right in the husband, this very reciprocity must rather be regarded as the proof that there is such a right. All genuine and pure Rights in Persons, involve a reciprocity in so far as the subject of such a right is at the same time the object of a right, although it may not be the very same right. By this fact the personality of the individual is maintained under such a form of dominion, and is preserved from the fate of things as absolutely subjected objects. Without a clear apprehension of this idea, the nature of Public Rights cannot be correctly understood.

Further, there is a right in one's own person, by which the will assumes an immediate relation to itself. The Right of Personality, as the jural power of being a person, is a complete power over the whole determination of the person. Against this conception of personality as a particular right, it has been objected that *every* right is such a relation of the will to itself; for every right contains the subjection of an object to the will. This is correct, and in fact every right is on this very ground an externalization of Personality as the power involved in all rights. As the owner of a thing, I bring it into relation to my own person; and in the assertion of ownership there lies at the same time the assertion of Personality, without which I could not be an owner. But this proves nothing against the conception objected to. There would only be force in it if the indirect relation of the will to itself referred to, excluded a direct relation. But we must rather draw the opposite conclusion, that this indirect relation demands the existence of a direct relation of the will to itself. If it is said that every right is a right in one's own person, and there is therefore no further place among rights for the personality as such, it would amount to saying that personality is a jural power in property and in obligations, but that without property or obligations it is itself not a jural power. In fact, a personality which formed only a possibility of rights would be a powerless thing which would continually be lost and merged in the objects lying outside of it, as it would lack the power to find satisfaction for even a moment in itself, or to rest upon itself. A possibility which could not exist as possibility, but must necessarily pass into something else, would not be freedom. Whoever, therefore, regards personality as not

being itself a right, asserts that it has its existence only in the rights in external objects, and that it is but the soul that is embodied in these rights, and without them it would vanish like a breath. Any one holding this view is on the same standpoint as he who recognises God as only the soul of the world, and who accepts only a God in nature. And as the latter gives up the personality of God, so does the former in fact give up the personality of man, putting in its place a mere possibility which can only have a potentiality of existence in something else. Its being, therefore, can only amount to a being outside of itself, and this would be quite wrongly called a personality. We may thus see what would remain of other rights, if the head of them all were taken away with the removal of the right of personality.

Jacet ingens litore truncus,  
Avulsumque humeris caput, et sine nomine corps.<sup>1</sup>

3. Between Things and Persons there lies another third object, from which a separate class of Rights arises. One Person is bound to another by obligation to perform something which has a real value, such as the giving of a thing or the guarantee of active power. Thus by the Obligation of one person who becomes a Debtor, another

<sup>1</sup> Objection is taken to the Right of Personality viewed as a right in one's own person, that from it there would follow a *right to commit suicide*. This objection is entirely groundless and inapplicable. It rests upon a confusion and interchange of the conceptions of 'man' and 'person.' Personality is not a power over our own *humanity*, but over our own person. The objection loses sight of the important and incontestable fact, that it is not the *person* as such, but the individual *man*, that is destroyed in the act of suicide. It would only apply as against any one who assumed a Right of Humanity in the sense of a jural power to be a *man*, which has never occurred to any sound understanding.

obtains a right as a Creditor ; and the object of the right is neither a thing, nor the value which the debtor has to discharge, nor the person of the Debtor, but something which stands intermediate between them. It is an *action* which forms the object of the right. The Creditor has thus a power over this action of the Debtor, but only in so far as it has a real value ; and therefore it is not a power over the *personal* side of the action, but over its *real* side. Hence the right of the Creditor would be satisfied even if the specific action should not be performed, were the value which it may have for him under the given circumstances discharged. Thus the object of the obligation at the same time becomes capable of being enforced ; for although an Action, in the full sense of the term, cannot be enforced,—as it presupposes an act of will to which no one can be compelled,—yet a Thing can be taken away from the debtor in which the action finds its perfect equivalent.

These are RIGHTS IN ACTIONS ; and they are distinguished in this respect from all other rights, that they are essentially directed against a particular person, such as a debtor, and his obligation is the counterpart of the claim upon him. They are therefore also called Personal Rights (*jura in personam*). This gives a peculiar character to the exercise and enforcement of them. They are exercised in the way of a demand for their performance, and it can only be directed against a particular person, such as a debtor ; he is the only person who can violate the right of the creditor by refusal of performance, and it is only against him, therefore, that the right can be enforced. An Action arising out of obligations, therefore, proceeds against a person who is already indicated by the existence of the right from

which the Action arises. Thus it is only the creditor who can raise an Action against a debtor. Such Actions are Personal Actions (*in personam actiones*). It is quite otherwise in the case of Rights in Things. The person against whom an action in connection with them has to proceed is not already indicated by the very nature of the right itself, but only by the violation of the right, which is not limited merely to some particular person who can be determined beforehand. Such Actions, in contrast to the former class, are called Real Actions (*in rem actiones*). The same relation holds of the right of Personality, and also of the rights in other persons which have received a form analogous to Real Rights ; such as the right of the paternal power, an action arising from which cannot be directed against the subject himself, but only against a third violator of the right. The relation does not apply to pure rights in persons, such as Conjugal Right, Parental Right, and Public Personal Rights. In these cases, enforcement of the right against the person who is its object is not excluded, although the violation may have been caused by a third party ; nor is the prosecution of the right against this party impossible. Thus a husband may assert his conjugal rights against the parents of his wife, when they keep her from him ; or one corporation may assert a right against another that contests a claim over a citizen ; or one who has a right to jurisdiction may raise an action against one who interferes with his relevant rights.

All the rights which can belong to us, are thus either Rights in Things, or Rights in Actions, or Rights in Persons.

### Relation of the System of Rights to the System of Jural Relationships.

In conclusion, we have still to consider the relation of the System of Rights to the System of the Jural Relationships. The latter rests upon the positions of persons, the former upon their actions. The System of Rights begins within the System of the Relationships of Right. It is not at all restricted to Private Right. There are rights whose subject is a private person, a public person, and an ecclesiastical person; and so there are private rights, public rights, and ecclesiastical rights. The System of Rights is most completely developed in the department of Private Right; but in that of Public Right, as inclusive of International Right, all these classes of rights are also found. Thus, there are Rights in Things embodied in the jural power of the State over the territory which belongs to it. The separate property of the State, on the other hand, is to be viewed as a private right.

## C.—INTERNAL COMPLETION OF RIGHT.

### 31. Equal Right. Common Right and Singular Right. Privileges.

Right, as we have seen, consists in the recognition of the Freedom which belongs to man as the subject of a will, and in the protection of what is due equally to all, notwithstanding individual inequalities. Equality through the control of inequality, is thus the proper Principle of Right.<sup>1</sup> It does not exclude inequality; but the

<sup>1</sup> § 8 and § 9.

inequality that is natural does not as such enter into Right, in so far as is thereby meant the inequalities of men as individuals, including the inequality of their wants and the means of satisfying them. Right decomposes and transforms this natural inequality into an inequality of persons, of things, and such like; and it thus reduces them under jural forms and relations. Hence, it does not recognise the differences of men that are determined merely by strength of body or power of mind; but in so far as their actual operations press into the sphere of Right, it maintains the conception of equality among them by constituting them into differences of Persons as such, in reference to the jural action and powers of one person over another; and thereby it gives to these differences a jural character.

The more a right unfolds itself, so much the more completely will it become open to the claims of the different natures of men and things. So much the less stringent and hard will it thus become, and so much the more elastic will grow the forms in which it is embodied, while still preserving its fundamental principle throughout. It will thus always approach nearer to the idea of a right that harmonizes everything coming within its sphere in its own proper way; and so it will gradually realize the idea of equal Right, the *æquum jus*, as the Romans called it.

We may call the Right which maintains itself according to its proper nature in its own sphere, ' Pure Right.' It has also been designated *Common Right* (*jus commune*). But this pure development of Right is often broken through by Exceptions. The peculiar nature of individuals and of things, frequently asserts its claims in such a way that these are put above principles instead of being adapted to them. Exceptions from the order of

Pure Right have thus arisen. These have been designated by the expression *Singular Rights* (*jus singulare*) ; and in so far as they may favour certain persons or things against the Common Right, *contra juris rationem*, these exceptional rights are called jural Privileges or Benefits (*privilegia, beneficia*).<sup>1</sup>

It is not in the mere individual considerations involved that the character of the 'Jus Singulare' lies ; for Pure Right itself cannot and should not be withdrawn from this influence. It is rather in the mode and manner of the right that its peculiarity consists, in so far as it exercises its influence in the external form of an Exception breaking through and superseding the established principles of Right, instead of having its claims satisfied by a corresponding modification of the existing jural Institutions.

The fact that the latter method rather than the former is adopted in the establishment of a *jus singulare*, is founded not unfrequently on the want of that correct insight and that mastery of the material which is required on the part of the Legislator. It frequently also arises from the peculiar character of a certain right ; and is thus due to the jural ideas of the people themselves. And, finally, it springs from the imperfection of human things generally, which excludes the complete attainment of the idea of Perfect Right, or the internal completion of Right in its purity.

<sup>1</sup> Two kinds of Privileges are to be distinguished — (1) Exceptions from the *jus commune*, which are themselves common jural positions, as containing a rule for the regulation of a class of cases, such as the Privileges of Minors, of Women, and of Soldiers ; and (2) exceptions from Right in general, by which a special right is given to some particular person, which has no effect in other cases, however similar, such as the prolongation of the period during which a debtor may be protected from his creditors without its applying as a right to other debtors in the same position. It is only the former class of Privileges that are referred to.

## Chapter Fourth.

### JURISPRUDENCE AS A SCIENCE.

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#### A.—THE PHILOSOPHY OF RIGHT AND JURIS- PRUDENCE.

##### 32. Relation of the Philosophy of Right to Jurisprudence.

THE life in time consists of a movement in which the individual undergoes change without losing its identity. Every living organism exhibits two sides. It has, in the first place, a movement within itself as an organization ; it consists of members which are different from each other, and which are nevertheless held together by a unity constituted by the soul of the organism. Again, it has a relation to a higher whole, within which it moves, and of which it is a member. Thus the earth has a twofold motion : it turns around itself, and thereby distributes the light which is the source of its manifold formations over its surface ; and it revolves around the sun, by which it appears as the member of a higher organism.

So it is with the historical fact which we call Right. It involves a twofold distinction by which Right is made at once the object of a special Science called Jurisprudence, and of the universal Science which we designate as Philosophy.

Attempts have been made to distinguish a so-called Positive Science of Right, and a Philosophical Science of Right, in the following way. The former is said to have to do only with actual Right, or with what is positive and historical ; whereas the Philosophy of Right deals with a kind of right which is not given as a fact of experience, but which must rather be deduced and evolved out of the postulates of the universal Reason. The Philosophical Science is thus represented as having for its object a Right which has no history, but which arises eternally and immutably out of the laws of the unchangeable Reason ; and this Right was called Natural Right or Rational Right. But such a Philosophy of Right, in so far as it was logically consistent with itself, never had Right really as its object ; for Right can only have its origin in freedom. It was not even a genuine form of Philosophy ; for only that which has a history can be the object of Philosophy.

This distinction has been also expressed in the following way. The Positive Science of Right deals with the Right that *is*, the Philosophical Science deals with the Right that *ought to be*. Here again the freedom of existence was assigned only to Positive Right, and Reason was represented as being so powerless that it would strive in vain to put it under limitation. According to this view, Philosophy would have for ever to deal only with what was unreal ; for as soon as its object passed from the sphere of the *ought to be* into what really *is*, it would cease to be the object of Philosophy, and would fall under the cognizance of Jurisprudence as the positive Science of Right. It might be supposed that this delimitation of the two sciences had been invented by the Jurists, in order, by an artifice, to drive the philosophers into the

back premises of their building; but it was rather the philosophers themselves who laid claim to it, as apparently giving them a splendid reception room in front. By thus renouncing the sphere of the real and positive, Philosophy has fallen into the discredit of being hostile to it, or at the best of indulging itself in a mere harmless play of ideas.

In order to escape this charge of unreality, the philosophers have tried to advance a step farther. According to this later view, what *ought to be* is still held to be the object of the Philosophy of Right, but it is *what ought to be in the sphere of actual being*. Philosophy is thus represented as dealing with real Right, but only with that which is rational in it; and this rational element is represented as just what is most properly real in God. We have already shown what this latter assertion involves. Philosophy would gain little in the way of respect, if it excluded the free side of Right from its sphere, and appropriated only its necessary and finite side to itself. Besides, in whatever sense the rational may be understood, it could never be abstracted from the sphere of Jurisprudence, which as a science must always deal with it; and in doing so it would therefore leave nothing over for Philosophy. The distinction of Philosophy from Jurisprudence on this ground, would only come to this, that it would be half the Science of Right, or but an imperfect Jurisprudence. And this is the impression which is made by the Philosophies of Right as they move in these circles. Many of them contain Right, but no Philosophy; some of them contain neither Philosophy nor Right. The real function of the Philosophy of Right is to regard it as the member of a higher organism, seeing that the special science has not the means for dealing with it from this point of view.

It therefore specially devolves upon Philosophy, first of all, to show how our world is related to the whole organism of things, and how Right has arisen as an element in it, as well as how mankind have come to realize Right. Hence Jurisprudence must receive the general conception of Right from Philosophy, for this conception rests upon the relation of the universal organism of the world to its particular members. A beginning in the scientific treatment of an object can only be determined by going back to what precedes it, which, therefore, is some other thing than that which lies in the sphere of the special Science. Right as a member of the whole organism of things, has also a history in it and with it. This history of Right within the whole mental sphere of human experience, is therefore the second part of the task of the Philosophy of Right. The Philosophy of Right has thus to investigate the beginning, and to trace the progress of Right through the history of mankind up to its final consummation. The true philosopher is a seer who looks into a past that has vanished from the historian, and who beholds a future that is still veiled from other eyes; and he thereby gains a higher and wider point of view for what lies between them. A boundless field of reality is thus disclosed to Philosophy, in which her powers are to be exerted instead of being wasted in trying to deal with the unreal, and degrading herself from her position as the Queen of all the Sciences. Philosophy is stealthily robbed of her own, when the sphere of positive reality is withdrawn from her. But while thus maintaining her relation to it, it may not be superfluous in the present to recall the fact, that the Real is not to be confounded with what is merely present. The present must appear to Philosophy as a transitory

thing which she can neither maintain apart nor sink into without losing herself; and she might say with Faust,—

‘Then will the hour hear my refrain :  
“ O linger still, thou art so fair !  
And though thou bind’st me in thy chain,  
Yet will I gladly perish there ! ”’

The object of Jurisprudence as a special science, is the System of Right regarded as a separate organism apart from its general relations as a member of the universe. To the Jurist as such, within his own special sphere, the connection of Right with the whole spirit of man remains concealed ; and in order to obtain the knowledge of it in this relation, he must turn to the universal science of Philosophy. But, on the other hand, all the essential wealth of the whole sphere of Right, and its own internal organization, open up before him ; and the Philosopher in turn has to receive his knowledge of these from the Jurist.

The Jurist thus apprehends the System of Right as enclosed in itself, and in the present age it is presented to him in the Rights of some particular people. The Philosopher regards the rights of the several peoples only as the constituent parts and traces of the movement which Right takes in its march through the whole of humanity ; whereas to the Jurist they are isolated facts which he connects with each other under the assumption that one right passes into another as the system of one people has been partly received by the other. Hence the particular connections in the sphere of Right which form the subject of juristic investigation, do not yet constitute that universal connection according to which the rights of all nations are only parts of one movement.

Such being the relation between the Philosophy of Right and Jurisprudence as the special science of Right, it follows that they are both to a certain extent independent of each other, and also to a certain extent dependent upon each other. The extent of this connection is determined at once by the nature of their relation. The object of the science can be completely overtaken and exhausted only by the operation of both the Philosophy of Right and Jurisprudence. If the question is raised as to whether Jurisprudence is conceivable without Philosophy, the answer depends upon the meaning attached to the term 'philosophy.' A completely developed philosophical system is by no means to be regarded as a necessary condition of Jurisprudence as a science; and still less may the demand be made upon the Jurist, that he shall become a philosopher by profession. But without some philosophical knowledge, he will not be able to respond completely to the demands of his vocation. His philosophical insight, however, may assume the character of an unconscious habit of mind, and it has thus come about that the special science has dealt with Right in its own sphere in accordance with its real nature, before philosophy undertook as a system to discharge its task in relation to the subject. In this way a mutual process of giving and receiving has in fact been going on between them.

From this point we now turn exclusively to the consideration of Jurisprudence as the special science of Right. Its method as well as its object has still to be somewhat more precisely determined.

**B.—JURISPRUDENCE AS SCIENTIFIC KNOWLEDGE OF THE SYSTEM AND HISTORY OF RIGHT.****33. The Systematical Knowledge of Right.**

Right regarded as a living organism (1) involves a simultaneous multiplicity, arising from the fact that its elements separate into organic parts or members, which mutually condition and presuppose each other ; and (2) it has also a successive multiplicity, arising from the fact that it undergoes change in its various members and as a whole. The Science of Right has therefore two sides, the one systematical and the other historical ; and in the proportional combination of them, the true method of Jurisprudence consists. But this does not exclude the condition that a scientific investigation and exposition of Right in some particular relation, may proceed pre-eminently by the one method rather than by the other. It is not a one-sided method of procedure to give prominence to one side of the whole subject ; but the jurist is to be called one-sided when he deals with one side of his subject as if it were the whole of it.

The *systematical* knowledge of Right is the scientific knowledge of the inner connection which unites its parts together. The individual part is thus apprehended as a member of the whole, and the whole system is viewed as a body that unfolds itself in particular organs. The efficient power present in the simultaneous plurality of Right, and consequently the Principle of the system, gives the subject-matter whose inequality has to be overcome by Right, with the resistance which it opposes to the equalizing principle of right. It has already been shown how the system of the Jural Relationships and of

Rights themselves, arises out of the operation of this power.

It is only the systematical knowledge of Right that can be regarded as *complete* knowledge of it. This is seen, in the first place, *externally*, as this kind of knowledge alone contains a guarantee of certainly embracing *all* the parts of the system of Right in itself. Were we to regard the Science of Right as a mere aggregate of jural propositions, we would never be certain that we had made it our own in its whole extent; just as part of a heap of stones may be wanting without the spectator becoming aware of the defect, whereas when they are built into a work of art, a single stone cannot be awanting without the blank thus occasioned becoming immediately manifest. And so it is, conversely, in reference to the precise determination of the outline of the whole. Again, when looked at *internally*, such systematical knowledge is alone entitled to be regarded as complete knowledge; because Right itself forms a system, so that it is only in the knowledge of it as such that its nature is perfectly understood. Now, this systematical knowledge can only be attained by those who have mastered the connection of the Principles of Right, and investigated their relationship to each other, so that they are able to follow out the genealogy of every conception involved through all the connecting members, upwards or otherwise, that influence their formation. Thus, if we have to consider the particular right to go through a field which the owner of that field has assigned to the owner of a neighbouring field, we must as jurists take cognizance of its position in the system of jural relationships as well as of Rights; and therefore we must review its derivation from the conception of

Right, so that we may be able to descend from this general conception to the individual right in question, as its nature can only thereby be perfectly determined. It must be reviewed in a series of connections, as for instance: it is a right, therefore it is a power over an object; it is a right in a thing, therefore it participates in the special nature of a real right; it is a right in a thing belonging to another, therefore it is a partial subjection of the thing; the side on which the thing is subjected is that of its use, therefore it belongs to the species of rights relating to the use of things; this use is destined for a certain subject, and goes no farther, therefore the right is a servitude; it relates to a field, therefore it is a predial servitude; it is to be used for the particular requirement of a field, and it is therefore a servitude of way. This I call a genealogy of jural conceptions; and the designation implies that such a series is not to be regarded as a mere scheme of definitions. Each of these conceptions forms a vital element in the system, and is not a mere dead product that only carries on what it has received. Every element in the system has an individuality of its own distinct from the individuality of the elements that produced it; and we may figuratively regard these as the parents from which it derived a new and peculiar vitality of its own. To continue the simile: the principle of right may be regarded as the father of the jural Institutions, and the matter presented in the multiplicity of men and things may be regarded as their mother. In the latter constituent lies the element of necessity that is involved in the jural formations; it constitutes their rationality, and produces the qualification of Right as a system. Nor is it merely the knowledge of individual rights in their true nature and

meaning that is obtained from the consideration of the System. The connection of several rights under a jural relationship, the influence which they exercise upon one another, and the modification which they undergo from their reciprocal interaction, can only be comprehended in a complete and reliable form by means of the systematical knowledge of right as a whole.

### 34. The Historical Knowledge of Right.

The History of Right as a representation of its successive and manifold forms in time, has likewise a twofold direction. The organism develops and changes itself partly as a whole and partly in its several members. Hence, every member, while possessing its special life which is yet essentially connected with that of the whole and inseparable from it, has also a history of its own ; and this history has grown up in internal connection with the history of the whole organism.

Thus we have to distinguish the History of Right as a whole into two departments: the History of Right as a whole, and the History of the individual members of Right. The former has been called the *external* history of Right, and the latter the *internal* history of Right. These expressions, however, may very easily lead to misunderstanding, if they be taken to mean that the external history of Right has to do merely with what is outward and accidental in Right, and only the internal history has to do with what is inner and essential. Further, the designation History of the Sources of Right has also been used for the so-called external History of Right ; but this is much too limited an expression for the designation of its subject.

The object of the first part of the History of Right is the successive Movement of Right through those constituent elements, which are the essentials of the whole System. It embraces the genesis of Right, and consequently the nature and operation of the Sources of Right, the life of Right in the consciousness of the People, the Institutions established for its maintenance, its partition into Private Right, Public Right, and Ecclesiastical Right, and the Relationships of these parts along with the general character of the System as the Right of a particular people. The history of all these points falls properly within the first division of a History of Right, which is therefore by no means to be limited merely to the Sources of Right. Such a limitation of it, however, has been made by those writers who have undertaken a representation of the so-called 'External History of Right' as merely a history of its Sources, but in fact the limitation has been seldom or never carried through.

In earlier times, the so-called External History of Right was called *Historia Juris*, that is, simply the 'History of Right'; and when correctly understood, this was not unsuitable. But the inner history was then added to it as the *Antiquitates Juris* or 'Legal Antiquities,' and the expression thus received an improper application, as if only the first part of the history of Right was to be regarded as real history. But the antiquarian conception is so far from coinciding with the idea of history, that it is rather the very opposite of it; the distinction between them being that the former does not regard the subject-matter as in movement, but as at rest. From this difference there follows a difference in regard to their objects. Antiquarian investigation is limited to antique and past facts or states; historical

inquiry has to do with the present as well, only it views it in connection with its growth. *Jural Antiquities*, therefore, present us with a picture of the state of Right in any past time, without telling us how it arose, and what came out of it; whereas this latter consideration is a distinct problem of the History of Right. Antiquarian inquiry is thus an indispensable auxiliary of history; but it is not history itself.

Further, the name 'Legal Antiquities,' when applied as a designation for the History of Right, or a part of it, is more than an error of expression; for it has, in fact, gone hand in hand with a false treatment of the subject. The great advantage which antiquarian inquiry might otherwise yield to the historian, has thereby not seldom been lost. The histories of Right were not merely named 'Legal Antiquities,' but they were really nothing else. While the intention actually was to treat Right historically, and the inquirer thus imagined that he was satisfying his scientific conscience as well as his wants, our science actually came to be for a certain time entirely without history, which it cannot really dispense with. Even in our own day, there are still some in whom the after-pains of that confusion are still manifest. They either regard themselves as historians of Right, because they can boast of a certain industry directed upon the facts of the past; or they declaim against the history of Right in terms which ought only to be directed against the entirely opposite prosecution of an exclusively antiquarian treatment of the subject.

### C.—OBJECT OF JURISPRUDENCE AS THE SCIENCE OF RIGHT.

#### 35. The National Character of Jurisprudence.

It has already been observed that Jurisprudence as the special science of Right, deals with Right as the system of a particular people as such; and that it only goes beyond the limits of this people in so far as its system of Right has likewise passed beyond them.

By this limitation, Jurisprudence is not only distinguished from the Philosophy of Right, but it thereby receives to a certain degree a *national* character. It thus becomes Roman Jurisprudence, or German Jurisprudence, or English Jurisprudence, and so on. We speak indeed of a Greek, or German, or English Philosophy; but this is either done merely to designate the representatives of these systems collectively, just as we designate an individual system by the name of its founder, or these expressions are used to indicate a certain modifying influence of nationality upon the systems. Hence, in the philosophical sphere, it is an imperfection which is thus indicated by designations which are contrary to the real nature of philosophy, although not entirely exclusive of it. But, on the other hand, the expressions Roman Jurisprudence, German Jurisprudence, and such like, connote an influence of Nationality, which is by no means accidental, but is involved in the nature of the thing itself.

The activity of the Jurist is consequently directed specially to the jural system of his own country. In this lies the directly practical significance of the Science,

and this is specially accentuated in the term 'Jurisprudence.'

The contents of every science must admit and even require an application to life. In the case of certain sciences, however, this application is only indirect. These are the universal Sciences which have to be applied through their particular branches; and such indeed is their nature, that they would be vitiated by being themselves directly applied to practice. This has not seldom been the experience of Philosophy, when the philosophers, instead of keeping it to its proper function of giving a definite conception to the highest interests of man, and thereby giving weight and authority to Science, have preferred to found States, to sketch Law-books, or to establish a Religion. On the other hand, Jurisprudence would lose itself in the opposite way, if it did not keep the consideration of its immediate influence upon life continually in view.

Certainly nothing could be more erroneous than to understand this practical relation to be such that Jurisprudence should occupy itself with nothing but the consideration of the details of the jural propositions which can be directly applied to our present life. It is true that this practical tendency must be recognised by the Jurist in all its extent, and he must be guided by this thought towards his ultimate goal in all his investigations; but he is not on that account to limit himself to the mere enumeration and handling of practical details. Such a view of Jurisprudence is quite erroneous, for it would thus be made quite impossible as a Science; and any one who held it would be unable to give a reasonable answer to the question as to where the Jurist could then obtain his jural positions. Such a 'practical' view

of Jurisprudence might be illustrated by taking the case of a fruit-gardener, and supposing that because his work is directly 'practical,' he should have nothing else to do but plant trees with ripe fruits upon them; and if the question were raised as to where he could get them, he was referred to a neighbour who had some in his garden.

### Relation of Modern Jurisprudence to the Roman Law.

If Jurisprudence has for its object the jural system of a particular people, as has been shown, this is not to be understood as meaning that any Modern System is to be taken entirely by itself, and out of relation to the Systems of all other nations, so that what is common to them could only be sought in Philosophy. For in the systems of all those peoples which have had a common origin there is naturally something in common, which establishes a connection likewise in their Jurisprudence or Science of Right. And still more, all the European nations and their branches beyond the European continent, possess in their spiritual inheritance from antiquity a certain common good by which their scientific activity is held together in the sphere of Jurisprudence. This is the System of the Roman Law; and the influence which it has directly and indirectly exercised upon the rights of the modern peoples is more than anything else the element which connects their Systems of Jurisprudence.

The System of the Roman Law has therefore a twofold significance. In the first place, it forms an extremely important part of our modern system of Right. This holds true whether it is still formally valid or has assumed a new form in the modern legislations, whose substance at least is to a considerable extent derived from

it, especially in the department of Private Right. And, secondly, the Roman system forms the medium of a community of Right between different countries. Without divorcing it from its national basis, the Roman Law thus gives to our Science a significance extending beyond the limits of any particular people. Thus does this most national of all sciences follow the powerful tendency towards spiritual intercourse among the nations. A sure foundation is thus laid for it, which at the same time prevents this modern impulse from degenerating into a mere borrowing of alien peculiarities, that in time would make the rights of the nations a common patchwork worked together from portions of all their systems.

There are certain Jurists who aim at entirely suppressing the Roman elements in our modern systems of Right in favour of what is properly national, or at least who strive to subordinate them entirely. They may be compared to those who think that the salvation of modern Art is to be attained by abandonment of the antique, or who see in the study of the Greek masters only the corruption of modern poetry. Such thinkers must view history as but a sepulchral vault, in which the peoples that have passed away lie entombed with all the results of their spiritual life so as no longer to influence the after world. They must at the same time regard the community of the contemporary peoples, as well as the successive connections of the past, as an evil. They must also hold that the greatest possible isolation of a people from both the old world and the new, would be its highest good. And this would be their view, even if their object was to enable our native aboriginal Right to acquire the universal supremacy which the Roman Law has occupied for about eight hundred years.

The true method of treating the Roman Law in its relation to our present Jurisprudence will be that which corresponds to its twofold significance, as already indicated. It should be treated as a part of the Right of the particular people by which it is received, and in so far as it is the universal Right of the civilised nations. This implies that it should be regarded as having actually passed beyond the boundaries of the nation in which it arose, and therefore due prominence should be given to those elements which have bestowed upon it this universal significance. And this further implies that we are not to be the slaves of the letter of the Roman Law, just as little as in our Art we have to reproduce the Greek temples and statues, or merely to copy the poems of the ancients. We ought to be freed from the letter of the system, that we may be filled with its spirit.

It would be a mistake, however, to believe that this scientific freedom in dealing with the subject can be obtained without examining the Roman Law as it existed among the Romans themselves. Only from some living intercourse with this system of Right in its original home, will any one be able to pass with it beyond its first limited domain. This is, in fact, the training school which the scientific Jurist must pass through, as the Artist has to commence with imitation of his models and masterpieces. This training will begin to animate him with the very spirit of the future, for which it has to prepare him; but it must not attempt impatiently to transfer the harvest to the season of the seed-time.

## NOTE ON THE STUDY OF THE ROMAN LAW.

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PUCHTA'S 'Encyclopædia,' as translated in the preceding pages, was designed not only as a General Introduction to the Study of Jurisprudence, but as a Special Introduction to the Study of the Roman Law. Hence it was afterwards prefixed to his admirable *Cursus der Institutionen*, in which the History of the Roman Law is combined with an exposition of the Institutions. The special consideration of the Roman Law does not fall within the scope of this general Outline of Jurisprudence, but the Student will find ample and convenient guidance to the subject in any of the following works :—

Professor Muirhead's Historical Introduction to the Private Law of Rome. Edin. 1886.

Professor W. A. Hunter's Introduction to Roman Law, 1885; and his Systematic and Historical Exposition of Roman Law, in the order of a Code. 2nd ed. Lond. 1885.

Lord Mackenzie's Studies in Roman Law, with Comparative Views of the Laws of France, England, and Scotland. 4th ed. by Professor Kirkpatrick. Edin. 1876.

T. C. Sandars' Institutes of Justinian. Text, Translation, and Commentary. 7th ed. 1883.

Professor Muirhead's Institutes of Gaius and Rules of Ulpian. 1880.

E. Poste's Gaius' Elements of Roman Law. 2nd ed. 1875.

Dr. C. Salskowki's Roman Private Law, with Catena of Texts. Translated by Whitfield. 1886.

The juristic Literature on the Roman Law is so immense that it is impossible to do more here than merely refer to these Introductory Works. The Student will find a useful list of Authors prefixed to Lord Mackenzie's *Studies*, and references to the more recent Continental Literature, in Professor Muirhead's *Introduction*.—TR.



P A R T I I.

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SYSTEM OF JURISPRUDENCE

AS

A SCIENTIFIC ORGANISM.

BY

DR. ALEXANDER FRIEDLÄNDER.

Translated from the German.



## Section First.

### THE ORGANISM OF JURISPRUDENCE AS A SCIENCE IN ITS RELATIONS AND MEMBERS.

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#### 1. The Science of Man.

1. MAN may be viewed as a product of Nature, and in this connection the scientific knowledge of Man is embraced within Natural Science, as human Biology or Physiology. But Man is distinguished from the other living creatures by his Spiritual nature, and the study of the human mind or spirit is what properly constitutes the Science of Man, or Anthropology properly so called. While Logic and Metaphysics may be viewed as the formal and universal Sciences of Knowledge, the Mental Sciences have to deal with the operations and activities of the specific nature of Man as a spiritual being. The Mental Sciences are divided into Psychology, Ethics, and Aesthetics.

I. PSYCHOLOGY is the science which investigates the laws according to which the operations of the human Mind are carried on. It is otherwise called 'Pneumatology,' 'Phenomenology,' 'Nomology,' or 'Psychical Anthropology.'

II. ETHICS is the science which teaches how the mutual relations of men that arise out of their personal activities, are to be brought into harmony. It is other-

wise called 'Practical Philosophy' or 'Humanistic Science.'

III. *AESTHETICS*, or the theory of Art, is the scientific representation of the laws by which man reproduces the relations of the world in free [beautiful] forms so as to be perceivable by the senses.

2. The present state of these branches of science, is the result of the labour of many years. Their contents can only be properly viewed and understood, when it has been seen how far our knowledge has been advanced by the science of the past, and what there is still remaining for us to do in connection with them. In other words, we can only bring unity into the scattered details of knowledge, after following the course of its historical development.

## 2. Relations of Jurisprudence as a Science.

Jurisprudence is a branch of Ethics. Its function as a science is to establish the essential principles of *Right*; and as Right only obtains reality among men who are united into a State, it has also to establish the fundamental principles of the State. It is thus the Science of Right and of the State, that is, JURISPRUDENCE proper and POLITICS.

The *State* is the necessary unity of all the relationships of life that rest upon the consciousness of men; and it is therefore a rational organism. Hence it is, like reason itself, an original fact and an essential condition of human existence. The Science of Right and of the State, cannot then begin with the investigation of a condition of human life *before* the State, or of a so-called *state of nature* (Metapolitics). Such a state, unless we

understand by it only a condition of savage animalism, has never existed in fact. There have always been political Institutions in less or more developed forms, according to the stage of civilisation ; and the theory of a state of nature in which the individual was his own master in the relations of Right and Wrong, is a fiction.

Hence we can only think of men as beings living in community with each other ; and as the State is the completest expression of such a union of men, it ought to contain and realize everything that makes man, man. The State ought therefore to be the kingdom of moral freedom.—Hence all the relationships of life are embraced in the State, and it ought to secure to Man his *right* in these relationships. In the most comprehensive sense of the term, Right is thus nothing but the sphere in which the free development of every individual is realized. It thus includes what is called subjective right, title, or claim.

### 3. Division and Principles of Jurisprudence. .

The State, viewed as a whole, is, as Aristotle says, higher than its parts ; but it has only existence as a whole in so far as its individual members exercise their power independently within the whole. The basis of the State is therefore found in the *freedom of the Person*, and personal freedom is therefore also the principle underlying the scientific representation of the State. All men are Persons, or in other words, they have the power of self-determination as the possibility of maintaining and developing their existence. This principle forms the starting-point of Jurisprudence as a science, and is the basis of its division into *Public Right* and *Private Right*.

## I. PRIVATE RIGHT.

PRIVATE RIGHT, called also 'abstract, formal Right,' is the object of that department or branch of Jurisprudence which has to deal with the mere universality of the person as such, without regard to any special individual differences. The contents of the subject of Private Right are constituted by what is viewed and designated as '*Mine*' and '*Thine*.' That only is mine, however, which *can* be mine, and therefore this sphere embraces the objects of the world of sense, or what are expressed generally as *Things*. The relations of men to Things, have to be constituted in accordance with Right, and it is therefore the function of Right to regulate these relations. The subject of Private Right, is accordingly subdivided into—A. *Real Right*, and B. *Personal Right*.

A. 'Real Right,' as it is called, or 'Rights in Things' or 'Rights of Property' (*Jura in re*), as a separate division of Right, contains the sum-total of the jural relationships which arise out of the subjection of Things under our Will. Upon these jural Relationships are founded the ideas of Possession and Ownership.

B. 'Personal Right,' as it is called, or 'the Right of Contract and of Obligation' (*Jus ad rem, Obligatio*), includes the whole of the jural relationships which arise from any union of the wills of two persons.

This division into 'Real Rights' and 'Personal Rights' is the traditional one, but it is erroneous, since Right can only exist between Personalities; and a Thing can never have a Right.

It is to be observed, however, that while the *abstract* Right of the Person is the *basis* of Right, it is not the sole End and Object of Right. This abstract freedom of the Person is hollow and empty in itself, because it only includes the fact that man has obtained the *possibility* of fulfilling the real conditions of his personality, by subjecting the things of the earth to himself as his goods or possessions. This mere possibility, from its very abstractness, does not suffice us. It is incomparably more important still to make this possibility a reality; and this can only take place by securing to all the satisfaction of their wants by the means that are at command, whereby man as such, in all the fulness of his nature, is put above the merely formal Person of Right. But we only become Men among men, or in society; and real freedom is only attained by us in union with others. This consideration leads us to Public Right as the second division of the subject.

## II. PUBLIC RIGHT.

PUBLIC RIGHT is the department of Jurisprudence which deals with the union of men in Society as an organic whole.

At the outset it may here be remarked that the opposition between Private and Public Right, is just as unsatisfactory as the division of Rights into Real and Personal, as already explained. In the strict sense of the term there is no *Private* Right as a Right that is *absolutely and merely* individual. Right is always of a universal nature, and hence it may be said that there is no Right which is not Public. The dichotomy of the

usual division has been borrowed from the Roman Law, and it has a correct meaning only in so far as by 'Private Right' in the original sense of the term '*Jus privatum*' (from *privare*), is understood that Right which is related to the 'naked Personality,' viewed as divested of all other human relations.

'Public Right,' as thus defined, includes the evolution and establishment of those social institutions and relationships as elements in the formation of the people, by which the independent existence of men is secured. As it is not attached merely to the isolated individual, it is a higher stage than what is called Private Right, which is not merged in the individual, but only obtains its true significance in Public Right; for it is only in society that the conditions requisite for the maintenance of the individuality are secured. The freedom of the person is certainly to be kept in view in Public Right also, as an ultimate object, but it is not here regarded as having its principle and end in an abstract, isolated individuality. It now becomes a freedom by which the individual enters into union with others, gives up his mere self-seeking, and helps to establish the organization of the conditions of society.—The relationships in which Public Right is realized are comprehended in—A. *The Family*, B. *Civil Society*, and C. *The State*.

A. The *FAMILY* is the first and the natural relationship in which we give up our formal individuality, and gain in its stead concrete personality. It arises from *Marriage*, which, in its essence and purpose, rests upon a natural moral unity, and which, as a social institution, falls under the domain of Right. It gives origin to (1) *Family Right*, and (2) the Right of Inheritance or Succession, in so far as the dissolution of the family

comes into consideration. The Family stands upon the boundary between Private Right and Public Right, and thus forms the basis of Civil Society.

B. CIVIL SOCIETY is that union of men in which there prevails a common interchange of activity, with a view to the satisfaction of the physical and intellectual wants, and to mutual protection. This Civil Society, however, like all other forms of social union, has the character of arbitrariness and of a merely external co-existence. It is only in the State that the whole of the elements of society are brought into a conscious unity, in accordance with their conditions.

C. The STATE is the necessary rational unity of men who dwell together in a particular region. A State is inconceivable without Civil Society, just as a soul is inconceivable without a body ; but the State is not therefore *identical* with Civil Society. I enter into a *society* because I *will* to do so ; I enter into the *State* because I *must*. A band of robbers might form a well-organized society, but it would nevertheless not be a State.

### The Social and Political Sciences.

The State is the reality in which the whole spirit of a people lives. It must therefore contain everything that is necessary to the existence of the people, and the study of its various sides and elements gives rise to the various Social and Political Sciences.

I. The State must include, within its sphere, the means by which the physical life of its members is to be maintained. The principles according to which the production of these means is effected, and the welfare of the individuals provided for, are treated as a system

in the Science of POLITICAL ECONOMY or NATIONAL ECONOMICS.

II. The State must include the means by which the spiritual life of the people is to be developed and maintained, and consequently it has to provide for the spiritual welfare of its members by the requisite organization of Education and Instruction. The most general designations for what is involved in this relationship, are the SCHOOL, the CHURCH, and SCIENCE, and they are also to be included in the Science of Society.

III. The State has further to provide for the care and administration of Right. In the bosom of Civil Society there inevitably arise conflicts and disturbances, interferences with person and property, and, in a word, violations of Right. Every such violation is a disturbance of the social organism; it is contrary to Right, and as such it is a Wrong. There must therefore be a power constituted to remove Wrong and to realize Right. This power, as undisturbed by subjective influences and placed in authority over particular cases, is embodied in the Tribunals or Courts of Justice, and their function is to administer Right according to a settled process. As there are two kinds of Wrongs, the Administration of Right is twofold. Thus there is first of all the so-called *unintentional* or *civil Wrong*, by which Right in general is not knowingly and voluntarily violated as such, but there is only involved an infringement of the private Right or property of some particular person. In the case of Civil Wrong, I do not *commit* a Wrong, but I *have* in my possession a wrong object. The dispute in such a case only relates to the question as to whether a certain thing is to be declared the property of one person or of another, and the power of the Court is manifested by a process of

compulsion which, as an *execution*, alters the existing state of things. The procedure which moves in such cases within certain prescribed forms is called the *Civil Process*; and the same term is applied to the branch of Jurisprudence which has developed its principles scientifically. The second form of Wrong is *conscious, intentional Wrong*, as that by which Right as such is consciously negated. This *actual* opposition and contradiction of the law of freedom, by the will of the individual, constitutes a *Crime*. In this case the action of the Court is expressed in the form of a compulsion applied to the criminal will as a *punishment*. The procedure by which this is effected is called the *Criminal Process*, or the administration of Criminal Law; and the branch of the science which deals with it scientifically, bears the same name. The judicial principles relating to crimes and punishments, are thus expounded in the department of CRIMINAL OR PENAL LAW.

IV. The State must further include the regulation of *Police*. The department of the administration of Right is limited by the actual presence of Wrong, and it has, as its object, the restoration of the relationships of Right, when they have been disturbed. There is thus required another institution in relation to the more negative side of the common weal, with a view to 'the *possible* Wrong which, without yet being real wrong, is, however, its *real* possibility as shown by experience.' This then gives rise to the department of 'Police' in the State, and by its very nature its activity is very comprehensive, and such as may be easily abused in practice. Hence it is not to be extended too far, but rather to be limited to the most necessary regulations, and to such as are the least prejudicial to the common

liberty. Its proper sphere has been determined to be *the removal of whatever may involve danger in the community*, while the prevention of disturbances of Right that may threaten to arise from the wrongous will of individuals, has been assigned to another arm of the public power, the so-called *preventive administration of Justice*. These two spheres have also been separated in the scientific treatment of the subject.

V. PUBLIC POLITICAL RIGHT is represented in the organization which the State possesses as a living organic whole. The elements of Civil Society already referred to, as in effect realizing the conditions of independent existence, have their proper centre in the fact that they arise out of the consciousness of unity. But Civil Society itself loses the character of a merely external union, and of being a mere aggregate of men, and assumes that of a common personality as the union of the *People* in the *State*, which is a unity that is practically effective in realizing our independence of existence. The existence of the State as inseparable from our free moral existence, is thus itself an End. The State is one with our life, and its very *existence* also constitutes its Right. Thus it is that Public Right arises, and it is divided into—A. The *internal* Right of the State, and B. The *external* Right of the State.

A. *Internal State Right* is a system of principles which relate to the internal relationships of the State. It essentially embraces the consideration of five relations. 1. Constitutional Right is the doctrine of the power of the State. 2. The Right of Government, or Administrative Right, gives the doctrine of the guidance of the activity of the State. 3. The State, viewed as an individual, requires the means conducive and necessary to

the ends of Government. Hence there arises a third integral part of State Right as contained in the doctrine of *National Economy* or *Public Finance*. It includes the scientific establishment of those principles which are related to the procurement and expenditure of the material means that are required to satisfy the wants of the State. It is therefore a department of Political Science properly so called. 4. But in order that a State may continue to exist, an exact knowledge of its actual condition of life, of its powers and wants in all their extent, is continually requisite. It is thus that the strength and tendency of these wants are realized, and that provision is made for further development. Such a representation of the State at any particular moment of time, is sketched by the department of *Statistics*, as the science of the conditions of the State in their present existence. 5. To these four branches a fifth has still to be added, under the general name of *Politics*. In its original meaning, this term coincided with the Science of Right and the State, as defined above, and with their several branches. But if we understand by it an outline of the political conditions existing in the civilised world with an examination and estimate of them in relation to the purpose of the State and their influence upon the present, this division of the subject will belong to Universal History.

B. *External State Right*, or *International Right*, may be briefly indicated. The State, viewed as an individual organization, stands related to other States. States are jural Persons, and the Relationships arising from their co-existence must be of a jural nature, as is the case with the relations of individual persons within the State. These relations of Right between the several peoples thus form the object of Public International Right.

## Section Second.

### THE ORIGIN AND DEVELOPMENT OF RIGHT. THEORY AND PRACTICE. HISTORY OF RIGHT.

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#### 1. Origin and Development of Right.

1. THE destination of man is to realize and develop freedom. Freedom, however, becomes truth when it is practically translated into life ; and this is done by man through the power of his self-determination when he realizes himself as the centre of the world, and strives to comprehend it in thought. Man comprehends the world when he understands the relationships of things to one another and their origin.

2. Right is a formation of the relationships of life with a view to the attainment of freedom. It is by Right that we become free, and we ought therefore to will what is right. Right thus comes necessarily into existence as soon as men live together.

3. As regards its origin, Right is therefore neither the product of accident, nor of human arbitrariness, nor of an abstraction drawn from life. It is that relation of the human spirit of which the actual conditions of human Existence are the material, and the formative element of which is the will of the People realizing and comprehending itself in its unity.

4. The consciousness of the people is the *source* of Right, but as consciousness merely it has still no real existence. It attains to reality only when this consciousness is *externalized*, that is, *when the relationships of life are regulated in accordance with common conviction*. Hence, in order that Right may attain reality and truth, it must be externalized and expressed ; or, in other words, it must become *objective positive Right*.

5. The *form* in which the Right established by a people enters into life, is twofold. (1) In the first place, the Will of the people may express itself directly in external actions and thus become real, by all the members of the people recognising a jural conviction in a continuous Usage. The Right which manifests itself in this form is called *Customary Right* (*jus non scriptum*). 'Right as thus manifested has not yet the spiritual form ; it is the immauert rule of conduct.' Hence Customary Right flourishes at its fullest in the youthful life of the peoples and in the still undeveloped State. (2) But again, the will of the people may also externalize itself in such a way that abstract rules for jural conduct are expressly laid down as the Rules for the life of the people, and they are thus incorporated *in words*. The Right that manifests itself in this form, is called *Legal Right* (*jus scriptum*).

6. To these two forms of Right, some have also added, as a *third* form, the '*Right of Science*,' or as it is called from those who represent it, '*Juristic Right*' (*Communis opinio doctorum* and *usus fori*). But we regard this as an erroneous view. We consider that the science, viewed both as the theory of Right and its application in practice, has no other function than to ascertain by *interpretation* what is contained in the existing laws of

Right. 'In its activity science does not include the forming of Right, just as little as the miner forms the ore which he brings from the interior of the earth to the surface.' The results of a scientific investigation of Right may indeed in a certain way obtain authority, and the decisions of the Courts may acquire the power of an independent source of Right. But in either case this can only happen when they express what has been formed as a jural conviction among the people in narrower or wider circles, and when they are therefore the representatives of customary Right (*Observance, Precedent*).

7. The people being the former of Right, and every people being regarded as an individual, since every individual has a distinctive character, the characteristics of the people will also show themselves in their System of Right. The Right of a people is thus an integral constituent of their life, like their Language, Morals, and Government. Every form of Right thus becomes in its expression, *National Right*. Although the idea of Right is the same among different peoples, yet the course of its formation stands under the influence of cosmical and terrestrial conditions.

8. A people may be regarded as a natural whole, and from this point of view its system of Right also exhibits itself as *common* to it as a whole (*Jus commune*). But, again, viewed as a living organism, narrower circles within it may produce a *particular* mode of Right (*Jus particulare*).

9. Right is a product of the Will of the people. The people, however, can only will what corresponds to their stage of culture and their requirements at a particular time. Hence Right receives a development in space and time. It has a history, because it is practically realized

by man. 'There is an unfolding of its nature, in which it maintains its identity under change.'

10. Hence, in order to understand the present position of a people as regards its life in the sphere of Right, and in order to obtain an insight into what it should and must will in Law, an exact examination of the historical process through which it has lived is requisite.

11. Every people participates in the development of Right, and in this, as in everything else, it presents an image of Humanity in miniature. Right thus lives in every people, and completely in all the peoples. The chief efficient element in the creation of Right will, for the most part, lead to harmonious results, and the historical agreement in consequence will be so much the richer, the more the conditions exist that are conducive to a congruent development.

12. The complete Science of Jurisprudence consists, therefore, in the rational comprehension of the whole of the conception of Right as developed in time. In other words, the whole of Jurisprudence is embraced in the *Universal History of Right*. This Universal History gives a representation of the perpetual connection of the formation, growth, and living principle of a people, and shows, in fact, how the realities of Right have been organically developed in the course of time in the progress of the world's history.

## 2. Theory and Practice.

The Science of Right has to deal with the jural principles that are recognised as authoritative in a State. It has to make these principles its own in their whole extent, and it does so by clearly and certainly grasping

their internal connection and their significance for life. Such a concrete development of positive Right may be called a *Theory of Right*. Its result is a System of juristic Doctrine as the sum-total of the jural principles which can be obtained from the jural and legal material that is actually recognised in a particular State. As the Theory in this way lays down principles to regulate the application of Right, it conceives concretely what is realized by Practice in concrete facts. The Theory is the link between the Law and the Practice of it; by the Theory, the Law is first really known in Practice. Theory thus gives expression to what is practical, and to what Practice puts into application. What it has alone by itself, without regard to the requirement of practice, is not to be regarded as right Theory. Practice needs concrete insight, and it is the aim of Theory to give guidance and exemplification to it.

The distinction between Theory and Practice, thus stated, is the only one that is founded on the nature of the subject, and every other is erroneous. It follows from it that, without scientific theory, there is no genuine practice, and that right practice is never independent of theory. This truth must be the more deeply impressed, because the view is but too widely spread that practice merely consists in an easy, superficial, and dexterous manipulation of business forms; and it is even held that it is impossible to attain a scientific theory of Right that would be capable of embracing all the cases that might arise in life. But although, when the term is taken in a merely abstract sense, we must admit (with Goethe) that 'grey is every theory, and green life's golden tree,' yet we must also regard it as certain that true practice is something else than a mere mechanical dexterity of

forms, and that the routine lawyer stands in the same relation to the truly practical jurist 'as the quack to the physician, or the hodman to the architect.' In short, it must be maintained that a sound system of jural doctrine is not confined to the exposition of individual details, but embraces the spirit of the laws in question, the animation of the juristic sense, and the sure knowledge of guiding principles. It is only those who possess such a sound doctrinal system who will readily find themselves at home in the sphere of the jural relationships, and who will be able to follow them through all their details. A good theoretical jurist is necessarily also a good practical jurist.

The Science of Legislation (*Jurisprudentia legislatoria*) is to be distinguished from the theoretical Science of Right, as having for its aim the practical removal of the inconsistencies, defects, and wants discovered in the existing legislative system. It is not to be viewed as forming a separate science by itself, but as belonging to Politics in the sense in which that term has been used above.

### 3. The History of Right.

A scientific Theory can never be established by merely putting together the principles which find expression in the existing system of Right. For in order that it may achieve what it ought to do, there is further required a knowledge of the necessity according to which positive legal Right has obtained manifestation as such, under particular circumstances. The authoritative system that has arisen, and which has found expression in the authorized dogmas, is the last member of a chain of development

stretching through the past ; and hence it can only be understood and explained by History. To those who do not follow the development of positive Right and Law, and who withdraw themselves from the quickening influence of history, the Legislation of the present, as the last expression of the system, is but 'a book with seven seals.' And as Law is only developed in the State, all *jural* History is consequently also *political* History.

History, however, is not a mere enumeration of facts and of the consequences connected with them, or mere *pragmatic* History. Nor is it a mere representation of the *external* connection of the life of the People, but it is the living image of the *internal* development of that life. The study of such History ought not merely to teach us *that* there is progress generally in the world, but also *how* and *why* it takes place. It differs from the mere soulless aggregation of different facts, by searching into their ultimate reasons, and thus does the historical spirit rise from mere details to the *Philosophy of History*, the foundation of which is formed by the spiritual treasures of the nations of all times and all climes. The History of Law must be treated in this way. By its very nature, as we have already seen, it becomes a *Universal History of Right* ; 'for as the Philosophy of Language, as the special science of speech, arises from a comparison of languages, so does Universal Jurisprudence arise from a comparison of the laws and *jural* customs of the nations of all ages and countries, including those that are most closely related as well as those that are most different from each other. This Universal Jurisprudence is the Science of Right as such, without surname ; and it lends its true vitality to every specially named department of

the Science of Law.' In the idea of a Universal History of Right, there is difficulty involved, but the necessity of it is also implied. And its importance may be indicated by the fact that *in the unity of the System and the History of Right, the truth of Jurisprudence as a Science is realized.*



## PART III.

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THE  
SCIENTIFIC STUDY OF JURISPRUDENCE :  
ITS PRELIMINARIES, SPECIAL SUBJECTS,  
MEANS AND APPLIANCES.

AN OUTLINE OF JURISTIC STUDY.

BY  
DR. N. FALCK.

Translated from the German.



## INTRODUCTION.

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### THE SCIENTIFIC STUDY OF JURISPRUDENCE GENERALLY.

#### 1. Jurisprudence distinguished as a Special Science.

SCIENCE in the objective and universal meaning of the term, designates a body of connected truths methodically arranged. The Sciences are divided theoretically into several branches or departments, according to the different objects of knowledge with which they deal. They are also subdivided from practical considerations, because they cannot be made the subject of fundamental study in their whole extent. For although all the parts of human knowledge stand in connection with one another, and some of them hold very exact relations to each other, it nevertheless becomes necessary for the individual to limit his scientific activity in practice to particular departments of knowledge. The idea of a particular science thus arises whenever a separate part of the whole sphere of human knowledge is made the principal subject of study. Such a particular science is constituted by a certain body of homogeneous truths, or certain details of knowledge which are connected into unity by their relation to the same object. In this way the sum of the knowledge which is related to Right and Law, practically constitutes the special science of JURISPRUDENCE.

## 2. Nature and Value of the Study of Jurisprudence.

The knowledge of legal Right, as is the case with many other subjects, might be acquired by personal observation and experience, and the reading of juristic works. Among most peoples, however, a formal instruction in the subject of Law has been early introduced, although it consisted more in a practical guidance and training in legal matters than in theoretical discussions.<sup>1</sup> An important change took place with the institution of special Schools of Law devoted to juridical instruction, whereby education in the principles of Law took a wider range, and a scientific treatment of Right was introduced. As the Sources of Law grew in extent, and the principles of Right received further development, a formal scientific communication of legal truths in books or through Academic Lectures, became necessary. Yet even in the present day this should not be considered as the only right mode of learning Law, but a practical introduction to the forms of business should rather be con-

<sup>1</sup> [Thus, as Cicero informs us, in Ancient Rome the boys were obliged to learn the XII. Tables by heart, as a 'Carmen necessarium.' *De Legg.* 2. 23.] It is mentioned several times in the Sagas that the Icelanders and Normans of good families in the 10th century, used to stay a whole winter with persons skilled in Law, *in order to learn the laws*. The main object of this instruction appears to have been to communicate a knowledge of the formal solemnities that frequently occurred in their ancient system. (Cf. Müller's *Sagabibliothek*, Copenhagen 1817, 1 Bd. 88.)—It was always natural for fathers who were versed in Law, to seek to convey their knowledge to their sons, and this was formerly common in Germany and in all other countries. In Oefele's *Rerum Boicarum Scriptores* (ii. 10), a Connt of Ebersberg (1029) is represented as saying: 'Sigeberhtus et Theodoricus ac deinde Carolus jura dictabant, quæ si quis potens ac nobilis legere ignoraret, ignominiosus videhatur, sicut in me et coævisque meis apparat, qui jura didicimus. Moderni vero filios suos negligunt jura docere.' (Cf. Zschokke, *Geschichte von Baiern*, i. 174.)

nected with it from the beginning. By the existence of Faculties of Law, its study has become a principal and even exclusive occupation, and their purpose and value consist in qualifying their students by a fundamental knowledge of Right and Law, for the competent administration of justice. Such scientific study, also, in more than one way prevents legal disputes on the principle enunciated by Cicero: 'Potius ignoratio juris litigiosa est quam scientia.'<sup>1</sup> The Study of Law, in common with every genuine scientific effort, likewise occupies the human mind in a worthy manner. Hence it cannot fail in interest, unless it is limited to a mere knowledge of results, and thus loses its scientific character. The material advantages which may accrue from its study, need not be adduced as a recommendation of it; nor should the possible dangers to the character of the individual which are connected with the study or practice of Law, be considered as detracting from its value. The knowledge of these dangers, and the moral resolution to be on guard against them, will infallibly be a sufficient protection.<sup>2</sup> If the judgment of the people regarding the profession of the Jurists is wont to be unfavourable, it is to be remembered that this may have been occasioned partly by failings in the character of certain Lawyers, and partly by the wish that human relationships should not be made conformable to mere external Law.

<sup>1</sup> *De Legibus*, i. 6.

<sup>2</sup> Thus we have the Roman formula: 'Dolus malus abesto et juris consultus!' (Gruter, Corp. Inscript. p. 662, 5.) So there is an expression in the Dig. L. 88, § 17. *De Legatis*, ii. 'Hoc meum testamentum scripsi sine ullo jurisperito, rationem animi mei potius secutus quam nimiam et miserrimam diligentiam.'—A saying of Luther gave rise to a German Proverb that 'Jurists are bad Christians.' But in his Table-talk (c. 38) there is an excellent eulogium on the Jurists.

### 3. The Scientific Conditions of Jurisprudence as a Science.

Three things are requisite in order that the representation of the rules of Law recognised in a country, may really deserve the name of a Science. 1st, The Principles of Right and Law must be so completely treated that no jural relation shall remain unexplained, at least in its essential points. 2nd, The Grounds upon which the jural truths rest must be convincingly developed. 3rd, And finally, the arrangement of the whole System must be carried out, even in its individual parts, according to the principles of its internal essential connection, and not merely in accordance with an arbitrarily chosen logical scheme. The scientific character of the system consists in the union of these three qualities: Completeness, Depth or Fundamentalness, and Order. It has been held that all the various positions of the science are to be referred to one supreme Principle and deduced from it; but we hold that in the case of a science like Jurisprudence, which draws its material, in great part, from experience and history, this is impossible. More consideration should, however, be given than is commonly done to the difference between *Principles* and *Inferences* which as such have no independent existence of their own; and also between positive Principles of Law and the natural Consequences that arise out of jural Relationships. These distinctions ought to be carried throughout the whole legal System. Where the system has sprung from various sources of Right and different Legislations, a complete treatment of the whole, demands a previous scientific investigation of its several constituent parts. But, on the other hand, it has to be remembered that juristic study cannot actually begin in

this way, since what is now recognised as valid right must, in some measure at least, be known before the process of its historical formation can be understood and appreciated.<sup>1</sup>

<sup>1</sup> [The following English works on the Scientific Study of Law may be notified here for reference :—

[Sir William Blackstone, *Commentaries on the Law of England*, Sect. I. *On the Study of the Law*. (Read in Oxford at the Opening of the Vinerian Lectures, 1758. Refers specially to the uses and history of the Study of the Law of England.)

[John Austin, *Lectures on Jurisprudence*, 4th Ed. Revised and Edited by R. Campbell, 2 vols. 1879. (Student's Edition of Austin by R. Campbell, 1875. *An Analysis of Austin's Lectures*, by Gordon Campbell, 1877. *Clark's Practical Jurisprudence, a Commentary on Austin*, 1883.) Also Austin's *Province of Jurisprudence Determined*, 1832, etc. (See on Austin's position the remarks in the Preface to this work.)

[Samuel Warren, *Popular and Practical Introduction to Law Studies*, 3rd Ed. 1863.

[Of the numerous practical Guides to the Legal Examinations in England, those of Shearwood and Slater may be referred to—Shearwood's *Student's Guide to the Bar, the Solicitor's Intermediate and Final and Universities' Law Examinations*, with suggestions as to the Books usually read, by Joseph A. Shearwood, Esq., Barrister-at-Law, 1879.—Slater's *Guide to the Legal Profession*, forming a Practical Treatise on the various Methods of entering either of its branches, together with a Course of Study for each of the Examinations, and full papers of Questions with the Answers. *A Complete Guide to every Department of Legal Preparation*, by J. Herbert Slater, Esq., Barrister-at-Law, 1884.

[The elegant and high-toned Introduction by the late Professor Allan Menzies to his *Lectures on the Scottish System of Conveyancing*, may also be commended to the young Student, who cannot be too early or too deeply imbued with the spirit it breathes.—TR.]

## Section First.

### PRELIMINARY AND AUXILIARY STUDIES.

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#### 1. The preliminaries and auxiliaries of Jurisprudence generally.

JURISPRUDENCE, in the special sense of the term, properly includes only what constitutes juristic truth, and it is restricted by some to the exposition of those positions whose observance is secured by the possibility of coercion carried out by the State. In a wider sense, however, Jurisprudence is also regarded as including all the various kinds of knowledge that are necessary to the Jurist which, although they may not directly relate to juristic truths, are requisite either to a complete understanding or a proper application of the Laws, and which are conducive to the improvement of the existing System of Right.

#### 2. Auxiliary knowledge belonging to general Culture.

The scientific knowledge that is *auxiliary* to Jurisprudence can, in the proper sense of the term, only include what stands in some immediate connection with Jurisprudence itself, or its application, and which therefore is to be regarded as necessary for the investigation of the positive rules of Law, or for the knowledge of universal

jural truths indispensable to the Jurist in practice. But it need hardly be said that all other kinds of knowledge which can be acquired without prejudice to the main object of study, will not only be harmless and pleasurable, but will also be of advantage to the student of Law. The Jurist ought therefore to apply himself to the acquisition of those kinds of knowledge which are rightly expected to be possessed by every educated man, not merely for the sake of external appearances, but from special regard to the difficulties and dangers to which the Jurist is most exposed in his professional practice and business life. It is also proved by experience that those universal kinds of knowledge which belong generally to human Culture, conduce to further the study of Jurisprudence as a science, and facilitate its practical application in professional matters. Among such subjects of General Culture, the young student of law may be recommended, above all things, (1) to acquire a thorough knowledge of his own Language, and an accurate dexterity in using it; (2) an acquaintance with the Classical Literature of his country; (3) and the acquirement of the most important Modern Languages, with some knowledge of the best works contained in their literature.<sup>1</sup> It is right also to regard an exact knowledge

<sup>1</sup> [These preliminary requisites to any competent scientific study of Law are too obvious to require illustration, but the guardians of the highest and widest interests of the Legal Profession cannot be too keenly alive to their importance. Without substantial knowledge of the kinds indicated, no real progress or high attainment in Jurisprudence, can possibly be realized. Works on the English Language and Literature are so numerous and so well known that they need not be particularized. Study of the Modern Languages should be carried as far as a working knowledge of French, German, and Italian. The importance of French and German is universally recognised, but the Jurist will also find most important material in Italian in every department of his science.—Tr.]

of Religious Truth with a well-grounded religious conviction as an essential part of a universal Culture, and the acquirement of this knowledge and conviction should not be neglected by the Jurist,<sup>1</sup> who ought to strive not merely after those kinds of knowledge which merely give a certain brilliancy in society, but rather after such culture as corresponds to the essential requirements of the human spirit.

**3. Auxiliary departments of Scientific Study not directly connected with Jurisprudence. Classics; Mathematics; General History.**

Those departments of learning which are called general studies, are requisite as the necessary condition of the successful prosecution of every particular branch of knowledge. They are so far cultivated in the Higher Schools, and thus far belong to mere School education. The study of such sciences being necessary and essential to every kind of learned culture, ought, however, to be also carried on at the University, where they are taught in greater range and in a more scientific form. Among these universal disciplinary studies, the most important and essential are the *Classical Literatures*, *Mathematics*, and *History*.

**1. Classics.**—The ancient world, from whose scientific treasures and literary works the modern culture has arisen, is connected so closely by its Literature, and even

<sup>1</sup> ['To the qualities of the head I cannot but add those of the heart; affectionate loyalty to the King, a zeal for liberty and the Constitution, a sense of real honour, and well-grounded principles of Religion, as necessary to form a truly valuable English lawyer,—a Hyde, a Hale, or a Talbot.'—BLACKSTONE.]

by its civil Institutions, with the modern world, that no scientific education or culture can be complete without some knowledge of the Ancient Literature. And while the formative power, which is exercised by the classical Antiquity on every mind that obtains a knowledge of it, is a most important consideration, and the philological and critical study required by it appears as a means to that end, the independent value of this grammatical and linguistic study for its own sake, and the philological criticism accompanying it, is not to be regarded as insignificant. Classical Philology is the best preparation for the right philological treatment of the sources of Law, and in this respect it is indispensable. But apart altogether from this direct relation, which will be more specially considered, such philological study accustoms the mind to exactness in scientific investigations, and satisfies the spirit of inquiry without being subordinated to the gratification of mere curiosity.

**2. Mathematics.** — In these latter respects Mathematics has a great resemblance to philological studies, and it is particularly from this point of view that the study of Mathematics unquestionably deserves to be recommended to the student of Law, who has specially to take care that the interest of his scientific pursuits be not prejudicial to depth and exactness of knowledge.<sup>1</sup>

**3. History.** — History is a subject which is full of attraction for every one, and capable of an easily intelligible communication; it has at the same time an infinite depth of its own, and thus furnishes always new material for inquiry and reflection. Viewed as a pre-

<sup>1</sup> [The importance of Mathematics in relation to the Physical Sciences and of their study by the Jurist might be usefully dwelt upon. Leibnitz compares the Roman Law to the works of the Geometricalians.—TR.]

paratory science, its main advantage consists in showing the connection of the present with vanished times, in putting the life of the individual into communication with a great past, and in furthering freedom and candour of judgment by the great variety of changing conditions and views which it unfolds and presents. The representation of the remarkable men of History also becomes an effective and instructive form of teaching the lessons of life, as History shows the wealth of the powers that slumbered in them, and as the manifold tendencies to good or evil are thus exhibited in living example. Along with the Universal History of the human race, the Student will also derive much aid from a special interest in the History of Science and of Literature.<sup>1</sup>

#### 4. The Study of Philosophy as directly auxiliary to Jurisprudence.

PHILOSOPHY may be generally described as the science which expounds the ultimate and highest principles of all human knowledge, and in particular it aims at giving man an account of his existence and his destiny, with the

<sup>1</sup> [As regards the study of these Preliminary Subjects at present required in England, a reference may be made, for the sake of the Junior Student, to Bedford's Digest of the Preliminary Examination Questions in Latin Grammar, History, and Geography, with the Answers, 2nd Ed. 1882.—But the Student who is in earnest with the scientific study of Law, must carry his reading in these subjects far above and beyond this preliminary standard. Those who are aiming at the higher work of the Legal Profession should remember from the outset, and all through their studies, that, as Slater (*op. cit.* p. 8) has put it, 'there is no subject which the Barrister may not be called upon to advert to during the course of his speech, and at a moment's notice. A general knowledge of the Classics, History, Mathematics, Mechanics, Chemistry, Medicine, Philosophy, and in some cases Theology even, are the ordinary stock-in-trade of all Counsel in a fair way of practice.'—TR.]

rational grounds of his convictions and of his actions. This description at the same time implies that Philosophy must be of the highest importance for the personal conviction of the individual, as well as for all insight into the essential nature of science and every one of its parts. It may be also mentioned that the gift of certainly distinguishing the universal from the particular, and the essential from the accidental, as well as the power of applying universal principles to the particular branches of knowledge, are important consequences of the formal culture that is acquired by philosophical studies. Of the various sciences into which Philosophy is divided, and of the anthropological sciences that are related to Philosophy, some of them stand in a close and precise connection with the departments of Jurisprudence, and they will be referred to more particularly. The general study of Philosophy, as well as of the other preparatory sciences, may well precede the special study of Jurisprudence, and sometimes this is the order adopted in the Universities. It will, however, be more suitable not to separate them entirely, but to let the two lines of study advance together. By this external combination their inner connection is best realized, and the influence of the universal sciences will be more certain to further the prosecution of the special professional study.<sup>1</sup>—[Philosophy should at least be studied in its three important departments of Logic, Ethics, and Psychology]:

1. **Logic.**—[The importance of Logic as auxiliary to

<sup>1</sup> [The student of Philosophy may begin by acquiring a general knowledge of its history in order that he may clearly understand the meaning of its problems, their relations to each other, and the manner in which they have been dealt with by the greatest thinkers. Certainly no study of Philosophy can be satisfactory that does not embrace the historical

Jurisprudence hardly requires to be dwelt upon. An earnest and profound study of Logic is absolutely necessary as a preparation for the interpretation of the sources of Law, for a correct treatment of jural Principles, for the just appreciation of Evidence, and for the discussion of Cases.<sup>1</sup>]

**2. Ethics.**—Ethics or Moral Philosophy comes directly into consideration in connection with the universal theory of Right and the determination of the essential nature of Law. Jurisprudence and Ethics are thus not only closely related as kindred sciences and come into immediate contact at many points, but the doctrines of Right can neither be established nor explained without the investigation or assumption of ethical ideas. Hence a knowledge of ethical theories, especially in so far as they relate to the moral nature of man generally, must be of great advantage to the study of Jurisprudence, even if it be held that the principles of Right are not thus directly obtained or explained.<sup>2</sup>

development. The best introduction to the History of Philosophy is Schwegler's *Handbook of the History of Philosophy*, translated and annotated by Dr. J. Hutchison Stirling, 8th Ed. 1876. Ueberweg's *History of Philosophy*, translated by G. S. Morris, etc. (London 1874), gives very full and useful guidance to the literature of Philosophy.—TR.]

<sup>1</sup> [Of the Elementary Works on Logic, Jevons' *Lessons on Logic*, or Fowler's *Deductive and Inductive Logic*, may be chosen to begin with. Whately's *Logic* contains some useful reading, but it is now almost superseded by more systematic summaries. Bain's *Deductive Logic* and *Inductive Logic* are excellent text-books. Sir W. Hamilton's *Lectures on Logic* may be read along with Archbp. Thomson's *Outline of the Laws of Thought*. John Stuart Mill's *Logic* (*System of Logic, Ratiocinative and Inductive*, being a connected view of the principles of Evidence and the methods of Scientific Investigation, 2 vols. 8th Ed. 1873) deserves special study. Historical sketches of Logic will be found in Mansel's *Edition of Aldrich's Logic* (1849) and in Ueberweg's *Logic* (translated by Lindsay).—TR.]

<sup>2</sup> [The student of Law should be well grounded in Ethics, especially in

3. Empirical Psychology, as the science of the faculties and phenomena of the human mind, has even a greater direct applicability in the departments of juristic study. In several points of Criminal Law, as those relating to the degrees of guilt or the conditions which limit or suppress the freedom of the will so as to modify the culpability of action, and in other similar relations, the jurist has merely to apply certain psychological truths to the estimation of criminality. Along with this most important application of Empirical Psychology to Jurisprudence, it is not to be denied that the study of psychology combined with the self-acquired knowledge of human nature, will also make the jurist more capable of dealing with the practical affairs of his profession.<sup>1</sup>

view of the now general tendency to establish all Jurisprudence on an ethical basis. This tendency prevails both in England and in Germany. Among the numerous works on Ethics from the *intuitive and rational standpoint*, the following may be mentioned:—Dugald Stewart's Outlines of Moral Philosophy, 1795 (Ed. by M'Cosh); Dr. Thomas Reid's Essays on the Active Powers, 1788 (Ed. by Sir W. Hamilton in Reid's Works); Bishop Bntler's 'Sermons' and 'Analogy,' etc.; Fleming's Manual of Moral Philosophy, with quotations and references for the use of Students, 1867; Professor Calderwood's Handbook of Moral Philosophy, 1872, etc.; Kant's 'Metaphysic of Ethics' (Ed. by Prof. Calderwood), and his Philosophy of Law (1887); Green's Prolegomena to Ethics (Kant-Hegelian).—Among the works on Ethics from the *empirical and utilitarian standpoint* may be mentioned:—Bentham's Principles of Morals and Legislation, 1790; Deontology, or Science of Morality (Ed. by Sir J. Bowring, 1834); J. S. Mill's Utilitarianism, 1863; Herbert Spencer's Data of Ethics; Wilson and Fowler's The Principles of Morals, 1886; Professor H. Sidgwick's The Methods of Ethics, 3rd Ed.—Of the *Histories of Ethics* reference may be made to Sir James Mackintosh's Dissertation, 1830 (Ed. by Whewell, 1872); Sidgwick's Outlines of the History of Ethics (1886); Bain's Moral Science; Martinean's Types of Ethical Theory, 2nd Ed. 1886; and above all, to Paul Janet's *Histoire de la Science Politique dans ses rapports avec la Morale*, 2 vols. 3rd Ed. 1887.—TR.]

<sup>2</sup> [On Psychology, besides Locke's *Essay* (1690) and the works of the

chief representatives of the Scottish School, Reid, Stewart, and Sir William Hamilton (*Lectures on Psychology*, 2 vols., and his Ed. of Reid's Works), reference may be made to Brown's *Lectures on the Philosophy of the Human Mind* (1820), Bain's *Mental Science*, Mill's *Examination of Sir W. Hamilton's Philosophy* (1865); James Mill's *Analysis of the Phenomena of the Human Mind* (*New Ed.* 1869); J. Sully's *Outlines of Psychology*, 2nd Ed. 1885; and The Article in the new Ed. of the *Encycl. Britannica*.—Tr.]

## Section Second.

### THE SPECIAL SUBJECTS OF JURISTIC STUDY.

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#### A.—THE SCIENCE OF GENERAL JURISPRUDENCE.

(The Philosophy of Law.)<sup>1</sup>

##### 1. The Existence of Universal Jural Truths.

ALTHOUGH the old idea of Natural Law must be given up as impracticable, and although it may be held that a genuine Philosophy or Science of Law has not yet occupied its place, it is still possible to establish the existence of a system of Natural Law in the wider sense of Universal Jural Truths. It is a fact which cannot be denied, that all positive Legislations and customary Laws

<sup>1</sup> [The Philosophy of Law is here dealt with in its practical and concrete relation to Positive Law. Falck's standpoint is essentially the same as that of the English School and of Puchta and Friedländer. Friedländer, while representing the highest speculative insight, also holds that, 'The Philosophy of Law as a special science is superfluous. Philosophy cannot exist by itself as a science of the Absolute, and just as little can the Philosophy of Law exist as a separate science in contrast to the science of Positive Law. The Philosophy of Law after many deviations has again come upon the right path ; it has its sphere of activity in the midst of what is positive ; it has entered into the fresh moving life of the time. It has to reconcile what exists with the demands of Reason, "to recognise the rose in the cross of the age." It has accordingly even changed its name, and in virtue of its giving regard to Experience it has been designated "Philosophy of Law and Politics," or "Philosophy of Law

are imperfect, nor do they in any way present principles of Right that are available for all the cases that arise. It is, however, a necessary consequence of the jural order universally recognised in the State, that a right and just decision *must* be possible for every case in dispute. But if every decision is to bear the character of rightness and justice in itself, it is impossible to fill up all the lacunæ of positive Law by mere principles of Equity, or even by new Laws enacted for past cases. Every system of Law, just because it is incomplete, thus involves the silent assumption that there exist universally knowable and universally valid Principles of Law that may be applied to all undetermined cases; and these are regarded as needing no publication, and thus the published Laws pass them over in silence. Sometimes this view is expressly enunciated, and the judge is directed to complete the Law from his own reflection.

## 2. The Origin of Universal Jural Truths.

The problem which has to be solved in the ascertainment of general Rules of Law that will be applicable to

*and Comparative Jurisprudence.*" This "*and*," however, is superfluous; the designation is tautological, and the *Philosophy of Law* is not to be regarded as a special science. As soon as it is seen that the *Philosophy of Law* has no other function than the spiritual permeation of Positive Law, the contrast between the *Philosophy of Law* and the *Science of Positive Law* disappears; for their contents are really the same' (*Encyclopädie*, 142-3). The Literature of the *Philosophy of Law* will be found indicated in the Footnotes to the Translator's Preface to Kant's *Philosophy of Law* (1887). From this standpoint Jurisprudence is generally represented in the present work as the *Science of Law*, rather than the *Science of Right*, but the correlative principles of Right are always presupposed, even when they are not overtly expressed in the more concrete current terminology of Positive Law.—TR.]

undetermined cases, can be no other than to establish the universal recognition of a Rule as a juristic truth. For this two things are requisite:—(1) In the first place, it must be shown that a certain Relationship is constituted with those who stand under the guarantee given by the State, or that there is a legal protection given to them in that relation. (2) And, in the second place, it has to be determined what importance belongs to the facts that are to be judged in connection with the universal law of Right, or what declarations of will are contained in these facts. It thus comes to be of prime importance that all the legal consequences involved in the fact that a Civil Society with a jural order exists, shall be completely developed, and that the several relationships of Right shall be exactly ascertained, in their actual constituents, according to their proper nature. The essential characteristic of all jural principles lies in their necessity; and hence the mere applicability of certain rules to the human relationships is not enough to invest these Rules with practical validity. The *necessity* of a Rule is known in a twofold way, either by historical examination of the legislative will, or by inferences from recognised facts. The latter mode of Necessity may also be called a *logical* Necessity. The universal jural truths rest upon such a logical Necessity, that is, upon their absolute connection with other recognised principles and doctrines. The universal theory of Right can therefore only be established by an analytical development of given conceptions, and by determining their logical connection. As the jural principles which constitute the substance of the universal Science of Law are derived by a strictly logical argumentation from those facts which are presented in every Civil Society, it is evident why Universality may be assigned

to the jural truths thus found. The name 'Natural Law' is suitable enough in application to them, because these principles do not rest upon particular arbitrary determinations. Finally, by a reference to its distinction, both from historical inquiries and from philosophical doctrines, this theory of legal Right may be called a *rational* theory.

### 3. The Extent and Nature of Universal Jural Truths.

As universal jural truths are only found by a logical analysis of given conceptions, it follows further that a system of legal Right can only consist of universally valid principles in so far as the jural relationships are determined by given facts, and not by ideas drawn from considerations of final purpose or moral dignity. The general Science of Law cannot therefore embrace all the jural relationships, but only those that are not necessarily regulated by reference to considerations of purpose, or feelings, or ethical principles, and in connection with which the main point is to know what actually exists. It is chiefly in the sphere of real Rights and Obligations that the universal jural principles are directly regulative, whereas in connection with the Rights of Persons they are to a large extent limited or excluded.—It is sometimes far from easy to determine precisely the limits of the rational and of the historical in the sphere of Law; but that there is such a distinction cannot be ignored. One evidence of it is found in the fact that in the modern systems of Legislation, in which the principles of their enactments have been made known, no motives are assigned or appear for a great part of their jural principles. It is just the characteristic of universal jural truths that no special ends are conceivable in connection

with them. The principles of Law are not therefore to be established by a reference to their Utility, but they are received and recognised merely and solely because they express what is real truth.

#### 4. Methodology and Utility of General Jurisprudence.

The jural truths that are derived from the nature of Civil Society and the various facts contained in it, may be treated either in connection with the doctrines of positive Law, or they may be taken apart and expounded by themselves. It is practically a matter of indifference which method is chosen. For even the doctrines of positive Law cannot be expounded in a merely historical way, but they have also to be developed analytically in order that they may be completely understood. The method of treating positive Law is therefore in part the same as that which must be applied in the rational Science of Right, and the difference between them consists merely in the mode in which the objects of the analysis are given as facts.—But in relation to the study of Jurisprudence it is of great importance to distinguish the universal principles of Right precisely and definitely from the positive propositions of Law, and this is a strong ground for a separate treatment of them. The application of positive Law also depends on a clear knowledge of the distinction in question, in so far as the wider or narrower application of a rule of Law is conditioned by its positive or rational nature, and it is thus a matter of much importance as to whether a legal principle is rationally intelligible of itself or not. The distinction referred to is likewise of great importance in regard to the historical treatment of Right and Law. The universal theory

of Right has, by its very nature, no history, for the historical process can apply in this relation merely to the progress of the scientific knowledge of the theory.— Finally, it requires no demonstration to show that it must be of great importance for the practical Jurist to possess, in the universal theory of Right, a means by which he is put into the position of being able to decide justly upon any matter, even where positive Law fails to guide him.

## B.—THE SCIENCE OF POSITIVE LAW.

### 5. Law defined in its relation to the State.

By positive Law we understand a system of principles, enactments, and rules, to which the men living in a State or Civil Society are so subjected that, in case of necessity, they can be compelled by coercive means to observe them. Positive Law thus presupposes the existence of social unions which recognise prescriptions of the kind referred to, and which guarantee their observance. That such unions really exist, is a universally known fact that needs no demonstration. They have all essentially one and the same end, and the different designations applied to them only indicate certain modifications of form. The most general name given to such a union is 'Civil Society,' and it implies, by its very designation, that the union indicated guarantees its several members protection against one another. In so far as this Society is enclosed in certain geographical boundaries, is thought as independent of other similar unions, and is governed according to a determinate order, we call it a 'State.' The term 'People' is also frequently used as synonymous with these two names, but it further expresses the fact

that the men who live within the unity of such a Civil Society or State are united with each other, not merely by a community of law, but also by a relationship of origin.—When we inquire into the reasons by which men have been moved to enter into such unions, it becomes at once apparent that it is not only from the impulses of sociality and self-preservation implanted in his sensible nature, but also from the consciousness of his moral characteristics, that man feels the need to secure his existence upon the earth against arbitrary disturbances, and to bring it about that men living together shall observe a mode of conduct towards each other which may be consistent with the existence of peace and harmony according to a universal law. Experience, however, shows that men do not always do, or forbear to do, of themselves what may be required by their mutual relationships; and hence it becomes desirable to adopt measures which will guard against disturbances of peace, and restrain from arbitrary action those who will not do what is right of themselves. The possibility of instituting a coercion adequate for this purpose, depends on the union of a number of individuals combined for the mutual guarantee of public peace. In accordance with these relations, a system of positive Law may be more precisely defined as consisting of those rules or obligations the observance of which is necessary for the maintenance of peace among men living together, and which are secured by the common will of those who are united in the State.

#### 6. Nature and extent of legal Regulations.

From the relation of Law to the State, it follows that there are three classes of common regulations or prescrip-

tions which are to be regarded as original constituents of all forms of legal Right. These are, 1st, those that determine the relationship of individuals to one another in reference to a free and secure existence ; 2nd, those that are destined to maintain society as a whole in its union as a State ; and 3rd, those that arise from the religious and moral elements of society. In addition to these factors as constituting the jural rules (*normæ*) of a people, several other things are required. (1) And first of all, certain Institutions are necessary to secure the observance of these rules under positive guarantees. Thus Judges and Magistrates must be appointed, and their duties towards the members of Society, and of these members towards them, must be determined. (2) Again, the Rules prescribed by the State are not necessarily limited to the sphere which is defined by the Institutions referred to, but they may be extended to all Actions which are in any way connected with the well-being and security of the whole of Society. The regulations of the State may be thus extended in their range of application in order that the social life may thereby become as secure, noble, and agreeable as is possible, in accordance with the natural limits of the operations of the political power, as well as the intelligence and character of the people. As regards the extent of the domain of positive Law, there is therefore no limit *in abstracto*, and experience shows in fact that at different times there is a difference in the extent to which actions are withdrawn from the arbitrary freedom of the individuals and regulated by the enactments of the State. In the progress of Civil Society, the interests of its members become enlarged, and in the degree in which external and internal peace is settled, the powers of society may become more available for other

ends in common, and even for the furtherance of all that is useful, true, beautiful, and holy among men. The State has always been recognised by the better minds as the efficacious institution through which alone men can really become men.

### 7. Of Laws and the various meanings of the word Law.

The authoritative rules (*normæ*) that are recognised and guaranteed by a civil society, may be distinguished into two principal classes. 1. The first class consists of those that are recognised as right and valid, without reference to any sanction by the State, being constituted by the very existence of the State as a necessary consequence of that fact. 2. The other class, again, consists of those rules that are overtly established by the government of the State, and are accepted by the express determination of its members as a social body. Of these two constituent parts of the precepts or rules which have to be observed in the State, the first may be specially called *Right* (*δίκαιον, jus*), and the second may be called *Laws* (*νόμοι, leges*). The word 'Law,' in the special sense which comes nearest its etymology, thus designates those prescribed rules which have their foundation in some voluntary determination. There would, however, be little danger of misunderstanding were the word *Law* to be taken in a more general sense, so as to comprehend under it every Rule which can be carried out in the State with legal coercion when required. If the term *Law* is taken in this general sense, Jurisprudence may be defined as synonymous with the Science of Law (*scientia legum*). By *Law* is also understood any oral or written expression or declaration of will that contains

a jural rule or regulation. By any further extension of the meaning of the word *Law*, it ceases to express a juristic conception. And generally, the usage which applies the term *Law* to every rule that is recognised as necessary, and even to every formula which describes the characteristic of a particular phenomenon, must be regarded as a mere metaphor.<sup>1</sup>

It will further serve to elucidate the foregoing conception of positive Law, if we attend to the other meanings of the term and its various opposites. 1. Law, as above defined in the objective or universal sense of the term, designates the body of rules (*normæ*) that stand under the protection of the State, and they are at once distinguished in principle from other rules of conduct that stand either merely under ethical laws, or that may be observed from considerations of prudence, as well as from usages which are not obligatory.—2. The expression *Law*, in the sense of *Right*, is also applied to designate the whole of those conditions and relations of life that are included under jural rules. This application of the term is closely related to the meaning given above, and the theory of *Right* has also come to signify the scientific representation of those rules and relations. The scientific whole indicated by it is also thereby distinguished from other sciences generally, and

<sup>1</sup> [Compare the interesting discussion by Sir Henry S. Maine of the similar restriction in the application of the term *Law* by Bentham and Austin. 'Law, when used in such expressions as the Law of Gravity, the Law of Mental Association, or the Law of Rent, is treated by the Analytical Jurists as a word wrested from its true meaning by an inaccurate figurative extension, and the sort of disrespect with which they speak of it is extremely remarkable' (*Early History of Institutions*, p. 372, etc.). On the etymology and applications of the terms *jus* and *lex*, see Muirhead's *Roman Law*, p. 18.—TR.]

particularly from morals and politics, and is even contrasted with them.—3. The principles recognised by the State constitute the basis of a necessity to perform, or to forbear the performance of, the actions embraced under them. Viewed as a consequence of the laws, this forms an *Obligation*, and the title or claim which forms the correlate of the obligation to demand the performance or non-performance of certain actions, constitutes a *Right* in the subjective or individual meaning of the term. The two expressions, *Obligation* and *Right*, are, however, most commonly applied to relationships in which persons stand connected with one another.—4. Finally, the word Law is also used to designate, not the whole of the rules recognised by the State and protected by coercion, but only that part of them which are brought into application in the courts of the country. In this sense Law, as Justice, is contrasted with the political administration of the State. This notion of legal Right is a historical one; it rests in part upon a distinction in the constitution of every country, and in part upon the fact that the instruction communicated in Jurisprudence has been wont to give special regard to the office of the judge and the relative judicial functions.

### 8. Positive and Natural Law, and Written and Unwritten Law.

Doctrines and rules which can only be known by external evidence are called *positive*, and the same term is applied to the sciences that deal with such doctrines and rules. That Jurisprudence is, to some extent, a positive science, is apparent from the fact that knowledge

of Customs and Laws can be obtained in no other manner than by testimony. In so far, however, as jural propositions do not rest upon the testimony of witnesses, but have to be discovered from an examination of Civil Society, and the various circumstances and relations of life that appear in it, or have to be derived by inference from these facts, the sum-total of such rules may be called *natural Law* in contrast to positive Law. Positive Law, again, is of a twofold kind, according as the rules constituted by it require to be made publicly known, or are valid as law without such publication. The former condition is applicable to the regulations that are established by the legislative Power, which, as new voluntary rules, necessarily require to be publicly announced in order to obtain the universal recognition that is implied in the essential nature of a Law. This published Law is usually also called *Written Law*, although the term is not always strictly applicable to our modes of publication. The other class of positive jural rules constitute the *Unwritten Law*, and it is made up of the Customary Law that takes form among the people. Custom is nothing but a mode of action which has become so universally observed that it comes to be regarded as necessary. And hence it is evident that Customary Law includes the universal recognition of the rules thus observed; and this recognition is manifested even in a higher degree than can be realized in the case of the rules of the legislative Power. Further, Customary Law belongs in one relation to the Unwritten Law, which comprehends the principles that are derivable from the essential nature of Civil Society, and the human relationships that are placed under the protection of the State; and hence in another relation it has this much

in common with the Published Laws, that it must be attested, and it is on this account positive as regards its origin. These three constituent elements are all found in the system of every people, although in very diverse relations as regards the quantity in which the rules of each class are found.

### 9. Of the principle and value of Customary Law.

In the early ages the jural System was for the most part unwritten, but in the course of time it has been always more and more determined by published laws. It is only in quite recent times, however, that the recognition of customary Rights and Law has been regarded as an imperfection; and this view is connected with the idea that all Right and Law in the State must take its origin from the legislative power of the State. It has even been maintained that the binding authority of Customary Right must be founded indirectly on the will of the legislative power, and that Customary Law must receive its legal character from the silent assent of the Legislator.<sup>1</sup> If by this is merely meant that there are Laws in all countries which assume and recognise certain known usages of the country as regulative of Right, this would not explain how the customary rule was first introduced, nor would the original principle of Right involved in the custom be thus accounted for. This principle of jural Custom cannot be rightly regarded as contained in any consent or sanction of the Lawgiver. For, were Custom not

<sup>1</sup> [This is the view of Austin and his school. Compare Maine's solid and satisfactory review of their maxim, that 'What the sovereign permits, he commands' (*Early History*, Sect. xiii.).—TR.]

already law without this ratification, the then jural principle constituting the legal force of the custom would properly have to be contained in the will of the legislative power. But the declaration of the will of a Legislator only becomes a law by its formal publication, whereas it must be admitted that the custom as such becomes a law through the common will that is directly expressed in the mode of action by which it is constituted. On the other hand, it cannot be denied that when a Custom has once taken form, it continues to exist by the will of the legislative Power, for this Power could abolish or alter the custom as it can in the case of any other law. In fact, however, legislative limitation of customary law will only be necessary in rare cases; for in general the custom is natural in itself, and experience also confirms the view that those legal rules which have arisen of themselves will be conformable to the existing relations and wants of the people. In every case, Customary Law has the decided advantage in that it rests upon the free will of the people; and Blackstone considers it a laudable characteristic of English Law, that it consists for the most part of customs. It has been already observed that all Unwritten Law is not necessarily Customary Law. Nevertheless, it is not easy to determine the boundaries between Custom and the jural Rules that are derived from conceptions, because there may be contained in these conceptions certain modifications that have been produced by an unnoticed custom. Of late the designation 'popular' Law has been used by several jurists instead of the expression 'customary' Law.

### 10. Adjudication ; Equity ; Doctrine.

The usage of the courts, which may be termed *Adjudication* or *Precedent* (*usus fori, stilus curiæ*), is related by its nature to customary Law. It includes the whole of the rules of law that are established by the uniform practice of the public authorities in jural matters. Certain principles thus arise, and they come to have the force of law. It cannot be definitely determined *when* they acquire this legal power, but the condition implied amounts to this, that the number of the precedents in question must be sufficient to determine a public opinion regarding a point of law. It is manifest that it would be improper to assign to single judgments of a court such an effect. Yet the authority of a particular tribunal may sometimes be great enough to put disputed principles of Law out of doubt by a single decision.

Further, *Equity* (*æquitas*) is also to be reckoned among the sources of Law. The conception of Equity, however, is very unsettled and uncertain. In relation to rules of Law, Equity can only be understood to signify a system of convenient rules that are capable of being applied to any particular case, but which cannot be proved to be necessary either on historical or rational grounds. The application of Equity in jural relationships, therefore, always rests upon an imperfection of knowledge that is to be found even among the best, and it serves only as a practical expedient where the proper right of the case cannot be otherwise ascertained.

The *Doctrine* of the Jurists regarding what is right or legal, whether it be delivered orally or in writing, ought, by its very nature, to be merely an auxiliary or

means of helping to ascertain what the existing law is ; yet it has frequently become a real source of Law. The juristic Literature of certain times has exercised so great an influence, as history shows, that certain juristic writings have acquired the formal validity of law. This, however, is to be regarded as an abuse which really has no other foundation than spiritual indolence, or the inclination to believe in authority.

### 11. Diversity in the Legal Systems of different peoples and ages.

As Law arises through the medium of the collective will of a Civil Society, there must be as many systems of Law as there are civil Societies or States. This plurality and diversity of Laws may be viewed, in the first place, as a difference in *form* determined by the fact that the legal power by which they are constituted does not arise from a common origin. As regards the jural principles themselves, or their substantive *contents*, the various Laws presented in different systems may more or less agree or disagree with each other. The legal systems of all nations have indeed a common basis in universal human nature. But as human nature can nowhere appear in its essential universality as such, but always assumes in its manifestations the character of individuality, the universal principle present in every legal system is also specially determined by the characteristic peculiarities of the people among whom it appears. Different circumstances and relations lead to different laws ; and even under similar external circumstances there arises a diversity from dissimilar knowledge and estimation of human relationships. Owing to the

same causes, the legal system of one and the same people is not always the same, but it changes, even without the direct influence of the legislative power, in the course of the historical development of the people. In so far as this change arises of itself, and in so far as the legislation likewise undergoes change without being arbitrarily modified, the development proceeds according to organic laws, the knowledge of which is necessarily of great use in relation to the history of Right and Law. Taken generally, there appears a continuous tendency towards Universality, and, it must also be admitted, towards a certain bareness and want of character in detail. In view of this diversity in the legal Rights of different peoples, and the changes which take place even in the jural system of the same people, Jurisprudence can be a practical science only in so far as all the principles which it contains are connected into a whole by their common relation to a particular State and its existing Constitution.

## 12. Common Law and Particular Law.

Even at a particular point of time in any one State the uniformity of the laws, as regards their substantive contents, is by no means so universal and common that the same relationships may be everywhere adjudicated upon by the same rules. The legal principles which have become universally valid throughout the whole domain of the State, and which are to be applied wherever no particular rule has been established, constitute what is called *Common Law* (*jus commune*). *Particular Law* is the term applied to what has validity only in certain districts of the country in contrast to Common Law.

Common Law and Particular Law are relative in their nature and application according as a country may be regarded as a separate State, or as also part of another State. Common Law, however, always requires, by its very nature, a real political union as the foundation of the universal validity of its jural rules, and the material agreement of the principles of Right, or even the use of common sources of Right, is by no means sufficient to establish it.—The distinction between Common and Particular Law, rests primarily upon the geographical limits of the State and the several divisions of the country. For it is generally assumed as a principle that the modifications of Law are determined externally by territory, the related nationality of the individual peoples not now carrying the same distinctive influence as in older times, when the races and peoples lived mixed up in great masses with one another, and were not yet fused into separate nations. At present the conception of *territorial* rights has largely, if not completely, suppressed the idea of *personal* rights in the relationship of one State to another. Nevertheless, in reference to the districts of the same country, we have to maintain the principle, akin to the older view, that the legal right of a person is not to be considered merely by regard to his region or dwelling-place, but also by relation to his jural status. Even among the Jews the foundation of the particular Right under which they live in many places, is not primarily placed in their nationality, but in the position or judicial Status assigned to them under judges chosen out of their own people.

It might be thought that the particular legal rights of the several parts of a country have been occasioned by particular jural relationships and particular requirements.

This, however, is but rarely the case. These rights have arisen much more frequently from the fact that such districts, in earlier times, formed in some way independent free communities. And hence the legal right that arose during that period of their history was afterwards retained, and it could not but influence and modify any new legislation. Another occasion of particular rights lay in the prevailing view of the Middle Ages, according to which the several districts or *communes* of a country were allowed to determine autonomously the Law which they were to recognise and practise. Further, it is but natural that diversity should arise in a legal system that has been mainly formed and constituted by customs. Nor is it to be regarded as an imperfection that certain rules diverging from the Common Law should arise, as this is not only extremely natural, but it must be regarded as a condition without which legal Right would not be conformable to the relations and mind of the people. Besides, it is neither essential to the nature of Right, nor to the requirements of a civil commonwealth, that a universal uniformity of Law should be produced by the medium of a legislative Power. Without any arbitrary interference, a uniform legal system will arise of itself, as all experience shows, if only the Rights of the political power in the State are not disconnected in detail, and if the unity of the people can maintain itself undisturbed.

## C.—SOURCES AND FORMS OF LAW.

## 13. The Sources of Law generally.

The legal character of a rule, or its authoritative jural form, arises from its recognition in the Civil Union which has been founded for its guarantee. The rules themselves which constitute the material of Law arise (1) partly out of the circumstances and relations in which the individuals who are to be secured against disturbances, are placed by nature; (2) partly out of the life of the people as it develops itself with unconscious freedom; and (3) partly also from an intentioned activity that is directed consciously to the formation of Law. The last of these sources of Law cannot be regarded as original or as necessary in itself, as it only appears when Society comes to hold that an alteration of the existing order is necessary. The right and title to undertake such alterations are proper to the legislative Power, and they constitute part of the rights of the Government. There are accordingly three sources of Law: 1. The original nature of the human Relationships; 2. The life of the People; and 3. The legislative Power. In the case of the latter two Sources of Law, we must distinguish their products or forms from the sources themselves, as the phenomena in which the life of the People and the legislative Power manifest their activity in the formation of Law. The *Customs* which arise out of the life of the people, and the *Laws* which spring from the legislative power, may, with reference to the application of the term Law to the scientific representation of the rules that are recognised by the people, be likewise

called in another sense *Sources* of Law. By the expression 'Sources of Law' is commonly meant the sources of the *Knowledge* of Jurisprudence, and it is so used in what follows.

#### 14. Law-Books and Codes.

In almost all periods of history we find comprehensive collections of the authorized and valid Rules of Law made known under public authority. Among some peoples, however, they are found more frequently than among others. These 'Law-books' have sometimes had no other object than to put together the most important of the current principles of Law, and especially such as were contained in scattered documentary sources. Such collections or digests might indeed alter points in detail, but their purpose was not in any way to produce Law itself, and just as little did they exclude the use of other sources of knowledge. Of this kind are almost all the Law-books of the ancient world and of the Middle Ages, with hardly an exception. It is only since the middle of the last century that another conception of 'Law-books' has arisen, according to which their purpose is to embrace the whole legal system, common to a nation in a degree of completeness sufficient for its application in practice. Such law-books, called 'Codes,' began to be prepared in Prussia from 1714, in Austria from 1753, and in Russia from 1767. The first that was actually brought into use was that of Prussia in 1791, which was followed by that of Austria in 1810. The celebrated French code, called the *Code Napoléon*, was much more rapidly formed, having been begun without much careful preparation in 1793, and established in 1804.—If such works merely indicated the valid system of Law, the

labour of preparing them might be undertaken by private persons as well as by the government. Private works, which embody the rules of Law without being scientific in form and treatment, are mere summaries of the legal system. In early times they were not uncommon, and they have even received the character of actual Codes from their universal use. Such juristic Text-books have frequently found their first occasion in the existence of particular courts for special kinds of Rights.<sup>1</sup>

### 15. The various Modes and Forms of Law.

The different kinds of written sources of Law may be viewed—1. According to their external form and extent of application ; 2. According to their origin as being indigenous or received from without ; and 3. According to the qualification of their legal Rules.

1. Form and Extent of Laws.—The Laws published by the Government of a State, do not always contain what is new, but often merely repeat and confirm what already existed as right. They bear various names, such as Statutes, Regulations, Ordinances, Enactments, Pro-

<sup>1</sup> [The subject of 'Codification' was strongly advocated by Bentham, to whom the term is due. The discussion was taken up by Thibant in Germany in 1814 (*Ueber die Nothwendigkeits eines allgemeinen bürgerlichen Rechts in Deutschland*), who was keenly opposed by Savigny in his celebrated treatise, '*Ueber den Beruf unserer Zeit für Rechtswissenschaft und Gesetzgebung*' (1814, 1829). The Law of British India has been concisely codified, and the tendency towards Codification in England is still advocated. See the excellent Chapter on Codification by Professor Sheldon Amos in his *Science of Law*. The Article on the subject in Holtzendorff's *Encyclopädie* may be referred to for the latest position on the Continent. On the formation and history of the *Code Napoléon*, reference may be made to Mourlon's *Code Napoléon*, 7th Ed. Paris 1866.—Tr.]

clamations, Edicts, Rescripts, Mandates, Instructions, etc. Such terms indicate the external form of the document, or the special nature of its contents, or the range in which the published rule is to hold. With regard to the substantive contents of the Laws, *Jura singulare* are to be specially distinguished, which establish Laws that deviate from what is general, but which, under the particular circumstances, are applicable to *all* the subjects. In so far as the application of such rules requires them to be regarded as legal regulations, they are called *Beneficia legis*. On the other hand, if only individual persons or particular classes or corporations are excepted from the Common Law, these special laws are called *Privileges*, and it is essential to their nature that they must be capable of repeated application. Privileges are thus distinguished from those dispositions by which the application of a law is suspended in an individual case, and which is called a 'concession' or 'dispensation.' Further, Privileges may be so bestowed as to become binding upon all others (*privilegia exclusiva*); and so far they belong to the class of common laws. Finally, there exists an important difference among Laws, in that some of them are universally made known, while others, although not embodying any mere exceptions from the rule of law, are communicated only to those whom they immediately affect. Such laws are not universally applicable in themselves, but can only be used under reference to their proper series and connection as attesting the existence of a universally valid principle of Right, and they are thus to be treated entirely in the same way as the decisions of the public Courts (*res judicatæ*). As Laws proper can only proceed from the supreme authority in the State, it follows that the common announcements

and other magisterial publications of them are legally binding only so far as they attest a valid regulation, or refer to such relationships as have their regulation by law entrusted to the discretion of particular Authorities. Certain communities and corporations (*universitates, collegia, corpora*) have frequently the right to pass decrees that are binding upon third parties. Such decrees are properly called '*Statutes* ;' and as such they are not mere compacts valid among the members of the corporation, nor do they rest indirectly upon such compacts.

2. Indigenous and Foreign Elements of Law.—If we look at the way in which the material of Law arises among a people, we find that it is either a product of the people themselves, formed by their customs and by acts of the legislative power, or it consists of jural principles and institutions borrowed from other peoples. This latter process has gone on so universally that there is perhaps no legal system which does not contain foreign elements. The distinction between indigenous and alien or adopted constituents of Law, indicates not merely the external origin of certain legal principles, but also denotes that foreign collections of law have been adopted as authoritative Law-books without undergoing any alteration in their form. Such adoption of foreign systems of Law has taken place in most of the countries of Europe in the case of the Roman Law, the Canon Law, and the Lombard Feudal system of Law. The adoption of foreign systems of law, is to be ascribed most frequently to the great influence of doctrine and the predominant authority which certain juristic writings have had upon practice. When a foreign system is adopted, it may either obtain unconditional authority, or be used only in a subsidiary way to complete the indigenous system of the country

(*jus subsidiarium*). The use of a subsidiary system, however, can never be necessary, as this necessity would be contrary to the existence of the actual order of Law among the people. Further, the recognition of subsidiary sources of Law leads to the inevitable consequence that the study of the principles of the indigenous system is neglected, and the natural development and unfolding of Law is checked or arrested. Only the conviction that a foreign system of law presents a satisfactory development of such jural rules as are knowable in themselves, can form a basis for the idea of subsidiary Right and justify its adoption in practice.<sup>1</sup>

3. Inhibitory, Prohibitory, and Permissive Laws.—In so far as we understand by Laws the rules prescribed by the political power of the State to its subjects, it is evident that in this sense there can only be *Inhibitory* or *Prohibitory* Laws, and no mere *Permissive* Laws. In reference to permitted actions there is no need of a special determination regarding them, for what is permitted may be immediately inferred from what is actually commanded or prohibited. Nevertheless the acceptance of 'permissive' Laws, and a consequent threefold division of laws into *inhibitory*, *prohibitory*, and *permissive*, may be justified by reference to the conception of Law as a public declaration of the legislative Power. For the declarations of the political authority may, of course, have it as their object to abrogate a hitherto existing rule that has been received as authoritative, or to declare it to be no longer existing, and thus to make action in that relation free. Every Permissive Law thus presupposes a real or supposed command or prohibition except in the

<sup>1</sup> [These positions might be illustrated by reference to the peculiar legal relations of India under the present English Government.—TR.]

case of such laws as serve for giving greater explicitness to a rule, and which, along with the commanded or prohibited actions, at the same time particularize some of the permitted actions to which it relates. A Law which allows certain hitherto illegal actions, and prescribes a definite form for the authorizing of them, constitutes a *Lex secundum quid permissiva*. Further, some inhibitory and prohibitory laws are not unconditional, but are often only intended to be applied where persons standing in jural relationships with one another do not agree to some other mode of action. Such Laws are appropriately termed *dispositive* Laws, because they merely develop the jural effects or consequences that are involved in the nature of a certain relationship. It is a characteristic of the older laws that they contain far fewer dispositive rules than the more modern laws, and that they are limited for the most part to prohibitive regulations.

#### 16. Division of Jurisprudence according to its internal organization.<sup>1</sup>

Although the whole of Jurisprudence is to be regarded as a unity, and treated as such, yet the separation of the various parts of the science by reference to the similarity or difference of the jural relationships and their treatment in distinct departments, is not inconsistent with this view. On the contrary, such a mode of representing the whole system of Law, under certain co-ordinate and subordinate sections, is an immediate consequence of the

<sup>1</sup> [This Division is introduced as Conspectus of the Subjects of Study, and for comparison with the Divisions of Puchta and Friedländer; but it has been thought unnecessary to reproduce Falck's elucidation of it in detail.—TR.]

scientific method. A scientific Division of Jurisprudence must, however, be determined by regard to the principal conceptions of the system, and not by reference to merely accidental circumstances, nor to the convenience of academical lectures, nor to the particular objects of certain writers, nor even to the way in which the Romans or the modern nations have arranged their systems. The conception of individual Right has been usually taken as the principle of a Scientific Division of the subject. But as this conception is correlative to that of obligation, this mode of division might just as well proceed from the idea of Obligation as from that of Right. In order to avoid this arbitrariness, it thus becomes necessary to put the higher conception of *Law*, which includes both these conceptions, at the head of the Science. According to the various more or less general facts under which the laws impose obligation, the particular parts of the system of Right arise, but the manifold connection of the jural principles and positions hardly makes it possible to form such a Division as would assign a distinctive place to each principle, so that it would be excluded from every other part of the system. Under reference to the main points of view thus indicated, the following are the divisions and sub-divisions of the science which naturally arise in a system of Positive Law :—

1. PRIVATE LAW, subdivided into

- A. Civil Law ;
- B. Ecclesiastical Law ;
- C. Police Law ;
- D. Criminal Law ;
- E. Process Law.

## 2. PUBLIC LAW, to which belong

- A. Constitutional Law ;
- B. Administrative Law ;
- C. Financial Law ;
- D. International Law.

The Exposition of the general conceptions involved in and justifying these Divisions belongs to juristic Encyclopædia.

## Section Third.

### THE SCIENTIFIC MEANS AND APPLIANCES OF JURISTIC STUDY.

—o—

#### 1. Juristic Philology.

A KNOWLEDGE of the Language in which any given laws are composed, is absolutely necessary as the condition of studying and understanding them. With reference to the actual Sources of Law, a knowledge of Latin and Greek is requisite for the study of the Roman system of Law, along with a knowledge of the modern language in which the Laws of the student's country are presented. On account of the great change which the Greek and Latin languages underwent in the age that followed the period of the classical writers, the philosophical study of the Jurist must extend beyond the usual limits of classical philology. As in the case of all linguistic study, it must be both lexical and grammatical. The former is certainly the more essential for an intelligent understanding of the sources. Grammatical knowledge, however, also facilitates this study; and it is specially indispensable when a critical treatment of the Text must be combined with the interpretation of it.<sup>1</sup>

<sup>1</sup> Latin Juristic Philology. (a) For the Study of the *Classical Jurists* :— Brissonius, *De Verborum quæ ad jus pertinent Significatione*, Frankf.

## 2. Juristic History and Legal Antiquities.

1. Every system of Law is coincident with the course of the development of the people to which it belongs, and with the whole past history of the community in which it is formed. Hence an exact knowledge of History, in so far as it is connected with the development of Law, is specially necessary for the Jurist. For the purposes of the Jurist, the History of the Roman people and of the Christian Church ought to be studied, as well as the History of his own country. In this historical study, attention is not to be directed merely to the various facts which have exercised an immediate influence upon the Sources of Law and the jural Relationships, but the attention of the student must also and mainly be given to the general character of the People as it is revealed in their social history, as well as to the changes gradually

1557 (Ed. Heineccius, Halle 1743). — Dirksen, *Manuale Latinitatis fontium Juris Civilis Romanorum*, *Thesauri Latinitatis Epitome*, Berolini 1837. (b) For the later and *Mediæval Latin* :—Du Cange, *Glossarium ad Scriptores mediæ et infimæ Latinitatis* (Paris 1678). Enlarged Ed. 1733–36. New Ed. by Henschel, Paris 1840.

For the *Greek Texts* :—*Glossæ Nomicae*, Ed. by Labbæns, Paris 1606, 1629. In Otto's *Thesauri*, by Schulting, 1697.—Du Cange, *Glossarium ad Scriptores mediæ et infimæ Græcitatis*, Lugd. 1682.

[For the technical terms in *English Law* :—Rawson's *Pocket Law Lexicon*, explaining Technical Words, Phrases, and Maxims of the English, Scotch, and Roman Law, etc. 2nd Ed. 1884. Wharton's *Law Lexicon*, Forming an Epitome of the Law of England, and containing full Explanations of the Technical Terms and Phrases thereof, both ancient and modern, etc. Ed. by Lely, 1883. Sweet's *Dictionary of English Law*, Containing Definitions of the Technical Terms in modern use, etc., 1882.

[For *Scottish Legal Terms* :—Bell's *Dictionary and Digest of the Law of Scotland*. Ed. by G. Watson, M.A., Advocate, New Ed. 1887. Most of the archaic Scottish terms in Skene's *De Verborum Significatione* (1599) are incorporated in Bell's Dictionary.—Tr.]

effected by external events in their public and internal relations. This study is requisite in order that the student may learn to understand the general foundation out of which the Law of every age has arisen. 'Antiquities' are not essentially different from History, in so far as the historian represents the internal state of society in past times, the subject of Antiquities being nothing else than the description of the whole condition of a State according to its various relations at a particular point of time. Historical Antiquities, or Archæology, may accordingly be described as a detailed and connected representation of those sections of a history which are devoted not so much to events, as to their influence upon the State. And hence it is evident that the study of Antiquities must be combined with that of History, and especially is this the case in the study of Law.

2. The History of Law, in the wider sense of the term, stands in a still closer connection with Jurisprudence as a narration of the changes which Right and Law have undergone. It is usually divided into external and internal History. The former contains the history of the Legislative power, of the Juristic Literature that has become a source of law, and of those Institutions which have exercised influence upon the formation of Law. The internal History, again, should comprehend a representation of the changes that have taken place in the principles and propositions of Right, and the transformations of the juristic doctrines that have been effected by Laws, Literature, and Practice. But the external and the internal history of Law are not two different parts of the science, but only different sides from which it can be treated according as attention is mainly given to the causes of jural changes, or only to these changes as

effects. Formerly, these subjects were treated apart in a special History of Right and Law (*historia juris, historia legum*), and in the Legal Antiquities as containing the historical materials in their several details. The internal and external Histories were afterwards combined, and treated in periods according to certain chronological divisions. As a history of Law cannot be understood without a certain knowledge of the principles of Right, and as the survey of the history of the several doctrines is impeded and made almost impossible by dividing the narrative into separate sections, it has lately been found very convenient in treating the Roman Law to combine the history of the Law with the exposition of the Institutions; and this has been done in such a way that the external history of the Law is treated by itself, while the internal history is brought into connection with the several doctrines of the legal system. Every system may naturally be treated according to a similar method. The rules for the regulation of historical inquiries in the Sphere of Law, are generally the same as hold in all other historical investigations. In legal history, however, a preliminary examination of the material is always necessary in order to distinguish the historical elements of the Law from those that are not historical, and in order to be able thereby to distinguish properly the changes in the legal system itself, from the progress made in Jurisprudence as the knowledge of it. It is further evident that the first mention of a jural principle, or of a legal proposition in the existing sources, is not to be at once regarded as its actual introduction into the system to which it belongs. This consideration has been so little attended to by several juristic writers, that it is not unnecessary to call attention expressly to

it. As in the case of every other department of historical science, legal history has to explain the historical phenomena in its own sphere as far as possible, and to trace out their principles and reasons. Here, however, the greatest caution is necessary in order to avoid false explanations.

3. In former times, it was usual to regard the study of the History of Law as well as of the accompanying philological and historical branches, mainly as a part of the complete general *culture* of a Jurist, without attributing to it any other importance than that of an elegant accomplishment. But these departments of study are unquestionably of great practical value. This practical utility may be regarded as consisting, either in their furnishing a knowledge of excellent juristic institutions which have been wrongly abolished, and of vanished jural principles which deserve to be brought again into force, or they may be viewed as supplying the necessary means for attaining a complete understanding and a correct treatment of the valid sources of Law. That the history of Law is indispensable to the study of the existing system, follows at once from the historical process of formation through which every legal system has passed; and this holds specially true of the modern systems, for which historical elucidation is indispensable, in order that they may not be misunderstood on many sides or falsely applied.<sup>1</sup>

<sup>1</sup> [The general standpoint and scope of the present work is to inculcate and guide prosecution of the study of Law according to the historical method and upon an historical basis, but only a few leading works out of the vast Literature relevant to this section can be indicated here.

[*History and Antiquities of Roman Law*.—Gibbon's *History of the Decline and Fall of the Roman Empire* (1776-1788) (especially the splendid chapter (xlii.) on the Roman Law). Niebuhr's *Lectures on*

### 3. Juristic Hermeneutics.

By means of the philological and historical Methods thus indicated, a preparation is made for an understanding of the Laws contained in any system, as regards the language in which they are composed, the objects of which they treat, and the relationships which they regulate. But in addition to these preparatory methods, there must further be an application of *Hermeneutics*, or the scientific principles of Interpretation, in order to discover and unfold the thought contained in every

Roman History and History of Rome (Ed. by Dr. L. Schmitz). Mommsen's History of Rome, 4 vols. (Transl. by Professor Dickson, D.D.). Ramsay's Manual of Roman Antiquities, 10th Ed. 1876. Heineccii Antiquitatum romanarum jurisprudentiam illustrantium syntagma. Frankf. 1771, Leuw. 1777. (See p. 135, *supra*.)

[*English Law*.—For the History of England generally a reference may suffice to the Histories of Hume (Student's abridged Hume with continuation, 1879), J. R. Green (A Short History of the English People, 1877; The Making of England, 1885), and the classical works of Macaulay, Froude, Freeman, etc. English *Constitutional History* :—Hallam's Constitutional History of England (with Macaulay's Essay); Sir T. E. May's Constitutional History of England (from George III.); Prof. W. Stubbs' The Constitutional History of England (1875), and Select Charters and other illustrations of English Constitutional History (1876); Taswell-Langmead, English Constitutional History, 1880; R. Gneist, The History of the English Constitution (Self-Government, etc., Berlin 1871), Transl. by Ashworth, 1886. English *Constitutional Law* :—Prof. A. V. Dicey, Lectures on the Law of the Constitution, 1885; Walter Bagehot, The English Constitution, 1867 (Delolme, Guizot, and Blackstone (Book IV. of Public Rights), may also be referred to). History of *English Law and Antiquities* :—Hale's History of the Common Law, Reeves' History of the English Law, Crabb's History of the English Law (1829), and other works by Spelman, etc., may be referred to.

[*Scottish History and Legal Antiquities*.—J. Hill Burton, The History of Scotland, 8 vols. 1876. Walter Ross, Lectures on the Law of Scotland, 2nd Ed. 1822. Lord Kames' Historical Law Tracts, 1792; Elucidations, 1800. Cosmo Innes' Scotch Legal Antiquities, 1872.—TR.]

passage of the Law. This process, as an interpretation or exposition of the several parts of the written Law, is different from merely translating it or commenting upon it. Hermeneutics is properly a consistent representation of the rules that are derived from Philology and applied Logic, by which the meaning of the contents of a law, as the thought originally embodied in it, is to be ascertained. According as this thought is determined by an application of grammatical rules, or by an examination of its logical connection under reference to the principle of the Law and the intention of the Legislator, the interpretation is called *grammatical* or *logical*. The difference between these two interpretations does not consist in the result that is attained, but only depends upon the means applied for ascertaining the thought; in other words, they are only different *methods* of interpretation. It is also to be noticed that Interpretation does not aim at any enlargement or limitation of the thought expressed, but only at unfolding what the Law actually contains. As regards *grammatical* Interpretation in particular, its principal task consists in discovering how the accidental and variable meaning of the terms is to be determined by their connection, and in this relation it has to examine the usage of the language employed. The necessary and accepted signification of the terms and forms of speech involved, is determined by the rules of general Philology. —The *logical* Interpretation has been erroneously regarded as proceeding according to an exegetical method peculiar to the Jurist. But although it should be guided by a knowledge of the laws which regulate the development and connection of thought in the human mind, it rests far more upon a certain natural tact that is trained by exercise, than upon definite rules.—Again, Interpretation

has been divided into *doctrinal* and *authentic* interpretation. But the term ' Interpretation ' is here, contrary to all logical rule, used in an entirely different meaning from that in which it is taken in the distinction between grammatical and logical interpretation ; and, further, this division is unimportant and superfluous, if interpretation and legislation are to be distinguished from each other, and not to be confused.—The scientific treatment of Juristic Hermeneutics has taken an unfortunate direction from the beginning. It started from a false idea of Interpretation, and was, moreover, led astray by its idea of logical interpretation, so that it stepped out of its proper path, and turned rather to the application of the contents of Law than to Interpretation proper. It has been usual to receive into Juristic Hermeneutics historical references to the Aids that are available to the interpreter, although they do not properly belong to it. In any case, it is advisable that the hermeneutic conceptions and principles be regulated by the study of general hermeneutic works, and of writings on the interpretation of classical and biblical authors.<sup>1</sup>

<sup>1</sup> Eckharlt, *Hermeneutica juris* (Ed. by Walch, Leipz. 1802, and Conradi, *Observationes juris civilis*, I. Marb. 1783). Thibaut, *Theorie der logischen Auslegung des röm. Rechts*, 2 Ed. 1806. Clossius, *Hermeneutik des röm. Rechts*, Leipz. 1831. Pfeiffer, *Elementa hermenenticae universalis*, Jena 1743. Beck, *Monogrammata de interpretatione veterum Scriptorum atque Monumentorum*, Leipz. 1790, 1791.

[The principles of Hermeneutics have been carefully examined and expounded by the writers on Biblical Interpretation and Criticism, such as Ernesti (*Institutio interpretis N. T.*, Ed. by Walch, 1792), Dr. Samuel Davidson, Keil, Doedes (Hermeneutics of the N. T., translated from the Dntch); and others.—F. Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics (American)*, 1880.—TR.]

#### 4. Juristic Criticism.

Textual Criticism stands in close connection with Hermeneutics, especially where the application of Law is in question ; for before the interpretation of a legal passage can be complete, the genuineness of the written Law and its several words must be made certain. This holds especially where the legal Sources belong to older times, and where they may have suffered alterations from various accidents, such as the mistakes or negligence of copyists.— The principles by which the genuineness of the Sources and individual parts of the legal Text, is to be judged, and the rules by which the restoration of the genuine text is to be effected, are determined by the science of Criticism. In relation to the object of the inquiry, it is divided into *higher* and *lower Criticism*. In relation to the means which it uses, it is called *Conjectural Criticism*, when it decides regarding the genuineness of a document and its text merely from internal grounds, without direct external historical testimonies. Conjectural Criticism must not be regarded as a mere arbitrary guessing and conjecturing, but as a careful examination that is guided by the use of all the available critical resources, and by a regard to the spirit of the author ; and therefore, even where external testimonies do occur, it is not to be at once rejected, as it may well happen that grounds derived from the internal connection may outweigh all external testimonies.<sup>1</sup> An application of Criticism without Interpretation is not possible, as the necessity of critical examination must be determined on hermeneutic principles, and the result of the criticism must be confirmed in like manner.

<sup>1</sup> Cujacii, Observ. I. 1: 'Plus ipsi rationi juris tribuo quam ulli Scripturæ.'

Nevertheless Criticism may be represented as an independent theory distinct from Hermeneutics, and the observations already made with regard to the study of Hermeneutics will also in the main apply equally to Criticism.—The testimonies by which Criticism has to determine the genuineness of a text, are chiefly Manuscripts and such early printed Documents as may be put on a level with them. The value of Manuscripts depends mainly on their age ; and this is determined, partly by the material of which they are composed, and partly by the characteristics of the writing. Works on Criticism usually give a general account of legal Manuscripts and of old prints (palæotypes, *incunabula*) of which the *editiones principes* are important. Opinions differ as to whether Criticism is to be applied merely as an auxiliary to Interpretation, or whether, apart from any such special connection, the restoration of the genuine Text is to be undertaken as an independent work ; but this question has no influence either upon the resources or the principles of Criticism. The application of Criticism in the latter relation is directed, either merely to the removal of apparently false Readings, or to a complete examination of the received Text in its several parts. Such a complete examination is indispensable to the perfect publication of an old author. In the case of Modern Laws there is certainly not so wide a field for the application of Criticism ; but even here there is no want of errors in printing or in copying, and the juristic critic has to exercise his function upon them so as to ascertain their correct reading.<sup>1</sup>

<sup>1</sup> Juristic Criticism is generally treated as a part of Juristic Hermeneutics. Of *general* works on the principles of Criticism may be mentioned : Clericus, *Ars Critica*, Amsterd. 1530. Morel, *Elémens de Critique*, Paris

5. Logical treatment of the material given by  
Interpretation.

In the exposition of a System of Law, there are several other scientific processes required in addition to that of Interpretation, and differing essentially from it. When the legal position contained in a passage of a given legal Source has been ascertained, and, when requisite, elucidated by Interpretation, it still remains to determine its relation to *other* legal Principles, as well as to examine whether the position ascertained is itself an independent Rule, or merely expresses the consequence of a higher Rule, and whether it is in any way altered or otherwise modified by other authoritative legal regulations. The

1766. [The writers on Biblical Criticism and the authors of the numerous recent Introductions to the O. and N. T. have discussed the principles of Criticism with fulness and care, *e.g.* Davidson, Keil, Bleek, Alford, Scrivener, and others.]

[The study of MSS., Codices, and early printed Sources, is of great importance. The older works referred to by Falck (such as Pfeiffer, Ebert, and Montfaucon) give the general positions, but are now largely out of date. Most of the works on the Roman Law give an account of the MSS. and early Editions of the Justinian Law-books (*e.g.* Muirhead's *Historical Introduction*, Sect. 91). Most interesting is the record of the discovery of the Palimpsest Codex of the Institutes of Gains by Niebuhr at Verona in 1816, and of its subsequent editings (see Muirhead's *Gaius*, 1880). The publication and translation of the Old Irish (Brebon) Laws from MSS. is suggestively described by Sir H. S. Maine in his *Early History of Institutions*. And in general, the publications of the English Statutes by the Record Commissioners in England, of the Acts of Parliament of Scotland (Thomson—Innes), as well as of the Ancient Laws of Wales, and of the Ancient Irish Laws referred to, are of the utmost importance for the Student, who will find much valuable and interesting information in the accompanying prefaces and explanations. The necessity of some knowledge of the tests of MS. authenticity in dealing practically with Charters, legal Writs, Records, Titles, and other documents, is obvious. Cf. Elphinstone's Rules for the Interpretation of Deeds, with a Glossary, 1885.—Tr.]

main point of view here always is that all the rules or laws contained in the legal sources must be regarded as having valid existence along with each other, until an actual contradiction arises, in which case the later and more general regulation receives the preference, unless there are special legal grounds for accepting the more special prescription. Accordingly, in order to facilitate their application, the rules that are contained in a principle, and that are reached by inferences from it, must be so developed that a particular case may be able to be judged by simply bringing it under the rule. This method—called the *Ars Hermagorea* by the ancients—must be carefully distinguished from the special application of a jural principle. For such application consists always in the judgment of a particular case which cannot be determined by rules, but is dependent on the free exercise of the judgment, and does not involve the development of new rules of law that are to be applicable to a whole class of cases, although, as often happens, a particular case may give occasion to such a development. The principle of this *dialectical* treatment of legal positions may be expressed by saying that every proposition that can be deduced by a strictly logical combination or consequence from recognised rules of law, is likewise a rule of law. Beyond this limit, however, the function of the Jurist cannot reasonably extend ; for every principle which cannot be justified in the manner indicated, even although it might have equity on its side, is only a result of arbitrary individual judgment, and does not belong to the legal system. It can hardly be supposed that the Romans adopted other principles in reference to this point, although they did not always exactly distinguish between logical consequences from

the laws and modifications that were introduced by practice. However this may be, any freer maxim regarding the treatment of legal right that would be contrary to the logical relations of the legal constituents of a system, cannot be now regarded as admissible. The value of an earnest and thorough study of Logic hardly requires to be pointed out in view of these considerations.

## 6. Knowledge of Foreign Systems and Comparative Jurisprudence.

Acquaintance with the laws and the legal constitutions of other States is not only important to the historian and the politician, but is also fraught with much instruction and advantage to the Jurist in the study of his proper subject. It is to be regarded as of no small advantage that the knowledge of the different forms, in which Right and Law have appeared among different peoples, is conducive to a more varied examination and to a more careful estimate of the legal system and institutions of one's own country. Still more important, however, is the advantage which may accrue directly to jurisprudence as a science, both on its historical side and in its general theories, from a wide study of the more important Rules of Law that have prevailed among different peoples. As regards the historical relation of this study, it is of chief importance to show the agreement among the systems of different peoples that is conditioned either by a historical connection between them, or by the similarity of their relations and the stage of their development. In this way it becomes possible to elucidate and explain one legal system by the aid of the others. Further, the object in view may partly be to ascertain the uniformities in the changes of

Rights, and to examine the laws by which these changes may arise. As regards the universal science of Law, however, the study of ever so many systems, and historical investigation of the rational principles accepted generally by the peoples, cannot take the place of a derivation and development of the Principles of Right independently of History. But a *Comparative Jurisprudence* (as the scientific treatment of foreign systems for the purpose in question may be called), will always be conducive as a means to the establishment of the rational rules of Law, and to the confirmation of the general theory of Jurisprudence. This it will accomplish by expounding and developing the agreement of different peoples in matters of Right, as resting upon a similar apprehension, understanding, and judgment of the jural relationships (*consensus gentium*). But if Comparative Jurisprudence is thus to accomplish anything useful, either for the history or the philosophy of Law, the study of the Foreign Systems must not stop at mere general statements, but must be carried out till detailed and particular knowledge of foreign principles and institutions is attained, both in the sphere of politics and law. It must further be evident that such investigations must be directed to what are properly the constitutive principles of Right and Law, and not merely to such propositions as may be deduced from the mere linguistic usage of the peoples. There is already much material collected for obtaining such knowledge of the foreign systems of Law, but the scientific elaboration of it as required for juristic purposes is still largely awanting.<sup>1</sup>

<sup>1</sup> [The supreme importance of the application of the *Comparative Method* to Jurisprudence is now universally recognised, and much progress has recently been made in this direction. It is the culminating characteristic

## 7. Juristic Bibliography, and History of Literature and Doctrines.

The knowledge of what has been hitherto accomplished for the promotion of a scientific knowledge of Law, is naturally indispensable to every Jurist in order that he may not, from ignorance, neglect the use of the resources that are available for his study. Juristic Bibliography has to indicate and specify the existing juristic works. It is now almost impossible to give a complete enumeration of all the products of Juristic Literature, and, in practice, Bibliography is usually limited to an indication of the more important and useful works.—The history of Juristic Literature, or of the scientific treatment of the subject of Jurisprudence, gives a survey of the changes which the juristic writings have produced in the knowledge and formation of Law, and it should also charac-

and distinction of the Historical School of Law (see the Preface to Kant's *Philosophy of Law*). Austin advocates and professes to apply the principles of the Comparative Method to Jurisprudence, but his standpoint was too insular and his range of vision too limited to lead to any very important result. A much more fruitful application of the Method is made by Sir H. S. Maine, whose works are full of historical comparisons and elucidations of an original, instructive, and often surprising kind. (*Ancient Law, and its relation to Modern Ideas*, 11th Ed. 1887. *Early History of Institutions*, 1880. *Village Communities in the East and West*, 4th Ed. 1883. *Early Law and Custom*, 1883.) These works have done much to raise the conception of Law in England out of the narrow grooves of Bentham and Austin's modes of thought, and to give breadth and universality to the Science of Law. The investigations of the students of 'prehistoric' Life and Custom (Sir John Lubbock, Tyler), and the Evolutional School generally, are also important from the legal point of view. The valuable work of Professor Carle of Turin (*La Vita del Diritto, etc.*) has been already referred to. The late Mr. MacLennan's contributions on *Primitive Marriage, etc.*, also belong to this department. M. Laveleye's works (*La Propriété et ses Formes Primitives*, 1882) are of acknowledged interest and value.—Tr.]

terize the scientific efforts of the Jurists generally. The Bibliography of Jurisprudence stands in close connection with its literary history, only that the latter deals specially with those writings which have exercised an influence upon the progress of the Science.<sup>1</sup>—The Biography of the most important Jurists essentially belongs to the literary History of the subject, but it is better to subordinate it to the narration of the movement of the Science than to make it a principal subject by itself.—Whatever method may be chosen in dealing with the History of Juristic Literature, attention should always be given to the changes that have taken place in the progress of scientific culture generally, and the political events that may be connected with the fates of Jurisprudence.—Further, the special literary History of the several doctrines of Jurisprudence, is to be distinguished as the *History of Juristic Dogmas* from the general literary History of the Science. It has to exhibit the doctrines and opinions of the older Jurists in their historical sequence. This species of literary history is naturally not treated by itself, but is always given in connection with the systematic treatment of the jural doctrines ; but, as it forms a very useful preparation for the scientific

<sup>1</sup> The oldest work of a *Bibliographical* nature is Ziletti's *Index librorum omnium juris tam pontificii quam Cæsarii*, Ven. 1566. The most complete work (in alphabetical order) is Lipenii, *Bibliotheca realis juridica*, 1676. (Post Struvii et Jenichenii curas emendata et locupleta, Leipz. 1757. Supplemented by Senckenberg, 1789, and Madihn, Breslau 1817, 1820 ; an abridged Ed. by Buder Struvii *Bibliotheca juris selecta*, Jena 1756.) The *German* Literature is given by Ersch, *Literatur der Jurisprudenz und Politik*, 2 Ed. 1823. The Literature on Natural Law is given by Meister (*Bibliotheca juris naturæ et gentium*, 3 pts. Gött. 1749-57) ; and that on International Law by V. Ompteda (*Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, 2 Bd. 1785, continuation by Kampz from 1784 to 1816, Berlin 1817).

treatment of a doctrine, it ought not to be neglected by the jurists. It need hardly be said that any such historical representation of former opinions ought to be complete, and if the changes that have passed upon the views taken of the subjects of Jurisprudence deserve to be known at all, they ought to be traced from their first beginnings down to our modern times.—Thus the History of the Doctrines that have been held regarding the Roman Law should begin with the opinions of the Scholiasts on the ‘Basilica,’ then pass to the Glossators, and next advance to the Jurists that follow them. The general literary History of Jurisprudence, is necessarily presupposed as requisite to a complete understanding of its doctrinal History.<sup>1</sup>

<sup>1</sup> On the *Literary History of Law* :—Nettelbladt, *Initia historiæ literariæ jurid.*, Leipz. 1779. König, *Lehrbuch der allgemeinen juristischen Literatur*, Halle 1785. Haubold, *Institutiones juris romani litterariæ*, 1809. G. A. Martin, *Juristische Literärgeschichte im Grundrisse*, Heidel. 1824. (Savigny’s History of the Roman Law in the Middle Ages and his Law of Possession are excellent examples of special Literary History.)

[The Bibliography and Literary History of English Law are sketched by Professor Brunner. In connection with English Law, reference may be here made to ‘Sweet’s Complete Catalogue of Modern Law-Books, British, American, and Colonial ; and a selection of such old books as are still of value. Compiled by Herbert G. Sweet, with full index of subjects by J. Nicholson, Librarian, Lincoln’s Inn. 2nd Ed. 500 pp. 1883.’ For the older books, see the *Bibliotheca Legum Angliae*, by J. Worral and Edward Brooke, 2 vols. 1788 ; Republished as Clarke’s *Bibliotheca Legum*, 1810. R. W. Bridgman, *Thesaurus Juridicus*, 1798, 1800, 1806, 2 vols. ; and *Short View of Legal Bibliography*, 1807.—Tr.]



## PART IV.

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# PRINCIPLES OF JURISTIC METHODOLOGY.

## OUTLINE OF AN ACADEMIC COURSE OF JURISTIC STUDY.

BY

DR. H. AHRENS.

Translated from the German.



## JURISTIC METHODOLOGY.<sup>1</sup>

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JURISTIC Methodology has to furnish guidance to the most suitable arrangement and mode of studying the whole of Jurisprudence as the Science of Law, and it specially aims at the right ordering of Academical instruction in the subject.

The study of Jurisprudence has always followed generally the spiritual tendencies and currents of the age, and it has in modern times experienced in its own sphere the same modifications and changes as other sciences. At the present time it exhibits, in common with other studies, a certain aversion to the pursuit of higher principles and to the recognition of its connection with the related Sciences, an isolating concentration upon itself, a mere accumulation of material and treatment of details, and, in consequence of all this, a more or less *materialistic* tendency that reflects the living movement of the age. It has come about in Jurisprudence that the belief in the higher principle of Right, which is the animating soul of the Science, has more and more disappeared, and the spiritual aspiration of the young student has been suppressed by the mass of material heaped upon him. And so much has the tendency to immediate pro-

<sup>1</sup> [The reasons for introducing this short sketch here have been stated in the *Preface*.—TR.]

fessional and utilitarian study gained the supremacy, that he has been deprived of the necessary spiritual freedom and leisure to apply his mental energy in the requisite way to the universal culture of the Sciences ; and even an indifference to all higher ends, and a sort of spiritual deadness and moral indifference, have been always coming more to the front in the whole sphere. While the duty of remedying this condition is incumbent upon the official authorities, especially in the Universities, yet salvation from these evils must be essentially expected to come from the insight of the teachers, and especially from the efforts of the students themselves. We therefore claim their consideration and examination of the following counsels, as suggesting the conditions of removing the evils referred to.

1. Philosophical study, as the basis of all general human culture as well as of all professional culture, requires to be animated anew. In some Universities the arrangements are made so that the students shall have completed their philosophical training before they are admitted to their professional study. This method, although approved by distinguished thinkers like Schleiermacher, is subject to the important objection that it separates in too abstract a way the study of Philosophy from the study of Law, which it ought to accompany and permeate. It is correct enough, however, to hold that, in the first stage of academic study, predominance should be given to the cultivation of the universal formative sciences. If Philosophy were based upon an analytical foundation, as has been done in Krause, the study of it might be most suitably begun in this way. 1. In default of such an introduction, a beginning should be made with *Psychology* (Psychical Anthropology), which is not merely of formal

importance like Logic, but is of the utmost importance in itself as the science of the essential nature of man. Psychology is thus the chief foundation for Ethics or Practical Philosophy generally, as well as for the Philosophy of Law, and in particular for the subject of Criminal Law, and in its own sphere it can best refute the shallow materialism of the time by close scientific observation.

2. Next to Psychology, *Ethics* should form the second subject of philosophical study, and it should be taken as the systematic science of the whole of practical philosophy, which in recent times has been treated in a profounder and more comprehensive way. 3. Besides these two philosophical sciences which are absolutely necessary for every student, attention should be also given to the further cultivation of the philosophical habit by the study of works on Logic, and—according to the predominant inclination—attention should be also given to Metaphysics or *Aæsthetics*,<sup>1</sup> or the History of Philosophy.

2. The special study of Jurisprudence ought to begin with Lectures on *Juristic Encyclopædia and Methodology*, unless a course on the Philosophy of Law take their

<sup>1</sup> [The subject of *Aæsthetics* may seem to have no affinity or relation to the Science of Law, however great may be its attractiveness to the student for its own sake. But the recent profounder thinkers in the department of Jurisprudence have fully recognised the *right* of Art, as an essential element in the social organism, to the same kind of recognition and guardianship on the part of the State as may be claimed for Religion and Science, or even Industry. Krause, Röder, and Ahrens are distinct and suggestive in dealing with the jural relationships of Art, according to the principles of the organic School of Law. Reference may be made to the excellent chapter on the subject in Professor Lioy's *Philosophie du Droit* (1887); and in view of the prominence which that distinguished writer gives to the *Hegelian Aæsthetic*, the Translator may be also allowed to refer the student to his recent publication, *THE PHILOSOPHY OF ART, An Introduction to the Scientific Study of Aæsthetics*. By Hegel and C. F. Michelet. Edin. 1886.—Tr.]

place. Juristic Encyclopædia, however, should not be dealt with in a merely formal way, according to the older dry and barren method, but it ought to expound the fundamental conceptions of the science, and to exhibit the connection of all its parts. The great advantage, and even the necessity of such an introductory course, cannot be questioned by any one who understands the mental conditions involved in the introduction of the young student to a science that embraces many branches and covers a very extensive field of knowledge. Any other view can only be accounted for by the fact that there is no recognition of a common principle and connection in all the parts of the science, and that the special professional study of Law is only pursued as a learned trade. By its very nature, the Encyclopædic Introduction should form the commencement of the study of Law, a position which has been assigned to it by the practice of a century.

3. We do not require to spend a word in further showing the necessity of a study of the *Philosophy of Law*. It is to be lamented that in consequence of the abstract and formal treatment of the principle of Right, the Philosophy of Law has been often expounded by men who had hardly a spark of the philosophic spirit in themselves; but as this abstract standpoint has been long since overcome by the progress of modern science, those who show that they have not advanced in their conceptions of Law beyond the old forms of 'Natural Right,' and who have not grasped the newer and higher formation of the subject, have really no right to pass a judgment upon such a Philosophy of Law. Different views are held regarding the place of the Philosophy of Law in the study of Jurisprudence. If the beginning is made with a course of Encyclopædia, and if some study of the

Roman Law — at least in the *Institutes* — has been carried on, the Philosophy of Law will then appropriately come in, and it will furnish the means of carrying on a desirable and instructive comparison of the philosophical conceptions with the positive facts of law. With a view to this order, the fundamental philosophical principles of the science ought to be somewhat developed at the outset in the encyclopaedic course.

4. It appears to be especially important to draw the attention of the Jurist to the much neglected study of *Social Economics* and *Political Economy*. The former of these, as the economic basis of the law of real Property and Obligations, should be early studied, if not along with the Roman Law, at least with the first course of lectures on Positive (municipal) Law. On the other hand, Political Economy, as well as the political sciences generally, may be taken up at a later period of study.

5. The *Historical Studies* connected with the subject, as well as the special history of the particular departments of Law, have been thrown too much into the background by the more positive departments, and they deserve again to be more carefully cultivated.

6. Finally, the *Political and Constitutional Sciences* ought to have greater attention given to them, and all the more because here the earlier studies must be essentially corrected and even transformed. Further, it is important that the young student should be made acquainted with the more correct political doctrines, otherwise he will be likely to take his knowledge from the large number of works produced by the older abstractly liberal and radical school, works which are most easily understood from their very superficiality, and which otherwise flatter many of the tendencies to which

the young student is most ready to yield. In order to guard him against erroneous views, it is therefore requisite to deal with these subjects scientifically.

In the arrangement of the Study of Law, it ought to be held fast as a general guiding principle that Jurisprudence is to be taught and learned on its three essential sides as *philosophical*, *historical*, and *positive Science*, and that these three sides of the subject are not to be separated from each other, but are to be taken up and studied together.

According to the positions thus indicated, the following series of Lectures might be recommended for a three years' curriculum in the Faculty of Law, each year including two Sessions (Winter and Summer Sessions) :—

**FIRST YEAR:** 1st Session. Juristic Encyclopaedia ;  
Roman Law ; Psychology ; National  
Economy.

2nd Session. Constitutional History ;  
History of Law ; Pandects ; Ethics  
(Practical Philosophy).

**SECOND YEAR:** 1st Session. Positive Private Law ;  
Ecclesiastical Law ; Philosophy of  
Law ; History.

2nd Session. Positive (municipal)  
Law ; Criminal Law ; Public Law ;  
International Law ; Statistics.

**THIRD YEAR:** 1st Session. Civil Process - Law ;  
Criminal Process - Law ; Medical  
Jurisprudence ; Administrative  
Politics ; Philosophy or History.

2nd Session. Commercial Law ;  
Political Economy ; Science of  
Finance ; Lectures on Practice and  
Legal Forms.

P A R T V.

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DEFINITION AND HISTORY  
OF  
JURISTIC ENCYCLOPÆDIA AS THE SYSTEMATIC  
SCIENCE OF JURISPRUDENCE.

BY

DR. ALEXANDER FRIEDLÄNDER.

Translated from the German.



## INTRODUCTION.

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### CONCEPTION AND HISTORY OF SYSTEMATIC ENCYCLOPÆDIA, AS THE SCIENCE OF THE SCIENCES.

#### 1. Conception of Scientific Encyclopædia.

1. Science is a living organism, and has as such a supreme positive principle of life. The essential function of Scientific Encyclopædia, is to show what is the idea that animates the several members of this organism.

2. As Encyclopædia has to deal with the development of the idea of Science, *it is itself a Science*. In other words, it is the 'Science of the Sciences.'

3. Hence, by its very nature, it cannot properly consist either of a merely external and mechanical arrangement of relations, nor of a loose aggregate and conjunction of separate propositions. It often appears, however, as the former, in the so-called external or 'formal Encyclopædia ;' and as the latter, in the so-called *internal* or 'Material *Encyclopædia*.' Nor is its true nature realized in the attempts made to produce a whole made up of both, so as to give at once an *External* and *Internal Encyclopædia* ; for a proper whole cannot arise out of the union of two arbitrarily separated things.

4. The central principle of every Scientific Encyclopædia is rather to be found in combining the material presented to the Science with its essential idea, thus connecting what

is scattered in detail into an inner unity. This is what is called a *System*; and a systematic Encyclopædia of a Science is just its organism translated into conceptions.

5. The method of a systematic Encyclopædia is the external form of its construction, corresponding to its internal unity as a system. It is conditioned by that internal unity, and it excludes from itself all mere dead compendious aggregation of material details. Such a scientific Encyclopædia does not require any special methodological appendix to show in what order the various branches of the Science should be studied. Rather will this order be indicated in the encyclopædic representation of the Science when the correct method is pursued.

## 2. General Sketch of the History of Scientific Encyclopædia.

1. Here, as so often happens, the subject itself is older than its name. Among the Greeks, the terms (*Εγκύκλιος παιδεία* and *μαθήματα ἐγκύκλια*) signified originally, and according to their etymology, the circle of the arts and sciences prescribed for the education of a free-born citizen; and in this sense they coincide with the *Μουσική* of Plato, as designating the whole range of the Greek culture. The Romans indicated the same thing by the expression *orbis doctrinarum* (Quintilian, *Instit. Orat.* i. 10; Vitruvius, i. lib. vi. præf.). This correct designation was gradually abandoned, and as the word *Encyclopædia* was resolved into its three elements (*ἐν, κύκλος, παιδεία*), it came to signify the system or *circle* (*κύκλος*) of all the Sciences.—The real founder of such a systematic Encyclopædia was Aristotle, who not only created a new terminology, but sketched in his Logic, in magnificent style, an architectonic

system of the sciences.—In consequence of the pragmatic dogmatism of the subsequent philosophical schools, the genuine philosophical spirit disappeared, and rhapsodical learning took the place of free inquiry, and knowledge became separated from life. Science found a refuge in the libraries of the Ptolemies at Alexandria, where were collected the products even of the most mechanical erudition. The several sciences thus grew in extent, while their contents became always poorer. Thus arose the age of the collections and compilations, from a desire to master the wealth of books; and whereas the mind formerly strove to control and spiritualize the material of knowledge, it was now subdued by it. Hence the appearance of the many soulless excerpts from the Roman and Greek writers, which, however, in this way saved much that was good from destruction. The Grammars and Dictionaries of the Alexandrian School were the offspring of the same impulse, but in these works a higher scientific spirit prevailed. There too, in like manner, the so-called *Trivium* and *Quadrivium* took their rise as a collective expression for all scientific education, and whoever undertook to write an *Encyclopædia* kept by them as his guide. To this tendency we owe the *Satyricon* of Martianus Capella, which was originally designed for use in the Monasteries and Schools, and which was afterwards edited by Hugo Grotius. So early as the seventh century, we have also the *Encyclopædia* of the Spanish Bishop Isidore of Seville. But in these works we seek in vain for any proper systematic connection, as they contain only aggregates of the concrete materials of knowledge.

2. In the Middle Ages, the circle of knowledge was enlarged by contact with Roman and Arabic culture, and the *Encyclopædias* of the time attained some per-

manent significance by their presentation of a connected summary of the most important sciences according to their principal contents. Efforts in this direction received a living impulse from the establishment of the Universities and their division into four Faculties, which livingly represented that to which the Encyclopædias aimed at giving written expression. And thus it was the Universities which properly formed the transition from the Scholastic Encyclopædias to more comprehensive works of the kind. To this period belong two encyclopædic master-pieces, which in a most worthy manner open the series, and which, surviving their age, have not yet entirely lost their value. We refer to the work of Gerbert (Pope Sylvester II.), entitled, *Figura de Philosophiæ partibus*, and the well-known *Speculum Majus* or *quadruplex* of Vincent of Beauvais (1250). Both of these works were saturated with Arabic wisdom; and the treatises of the Spaniard Vives (*De Disciplinis*, 1531) and of Reusch (*Margarita Philosophica*, Friburgi 1503), deserve to be associated with them.

In the Middle Ages, as these attempts succeeded and superseded each other, such designations were applied to them as *Summa*, *Speculum*, *Receptaculum*, *Beehive*, etc. But in the second half of the sixteenth century the name *Cyclopædia*, and afterwards *Encyclopædia*, was chosen; and it has been retained ever since. The basis of these so-called 'Encyclopædias' was formed by a mass of undigested historical material in detail, and the folios thus produced were only acceptable to the specially learned class. Hence it is that, including even those that appeared up to the Eighteenth Century, these works are now for the most part neglected or have disappeared. —A more permanent influence, however, was obtained by

two undertakings of the same kind and spirit that were published in the Eighteenth Century. These were the great encyclopædic Dictionary of the Chancellor Ludewig, in Halle, which appeared in sixty-four folio volumes (1735–1751), and which from the name of the publisher is usually called the 'Zedler Encyclopædia'; and the still greater French *Encyclopédie Méthodique* (1782–1832) in 166 volumes.

3. These two directions and methods, which may be designated as the philosophical and the empirical, were united in an intellectual and learned way by the brilliant talent of Lord Bacon of Verulam (1561–1626). His *De Dignitate et Augmentis Scientiarum* (1623), in its form and contents, bears the stamp of the independent philosophical inquiry of its author, and became the Organon of his age, as well as a model for similar creations in later times.—The great creation of the so-called French Encyclopædists arose from a similar dissatisfaction with the knowledge and life of their time. It took a one-sided attitude towards the subject of religion, and the wide and powerful influence which it obtained over all Europe, was mostly due to the literary reputation of its chief *collaborateurs*, Voltaire, Diderot, and D'Alembert. No work aiming at universality of knowledge has ever had a more brilliant success. In France the most strenuous efforts were put forth for a time to satisfy by such works both the wants of the educated classes and the general demands of the time, and thus to effect a mediation between life and science. But both in France and in Germany, the same causes have operated to prevent the complete success as yet of so great an undertaking.

When human life, in the incessant progress of its movement, and with its new inventions and discoveries,

outstrips the slow march of Science, there cannot but arise a discord between the position of the Schools and that of practical life. Hence, when the circle of knowledge expands, the longing for mere acquisition of learning makes itself more widely felt than that after profound and independent inquiry. Thus there arises the twofold demand for a mediation, on the one hand, of life with knowledge, and for a satisfaction of the thirst for knowledge on the other; and it is the function of a universal *Encyclopædia* to satisfy this demand, if it will deserve the name. Such an undertaking, however, belongs to the most difficult and yet unsolved problems. In Germany the effort has been made, in the greatest possible detail, to give a historical representation of the material acquired by Science, and hence the great number of Lexicons and so-called 'Real-*Encyclopædias*,' which, notwithstanding their various merits, only unite in an external way the full material of human knowledge.

The great philosophers of Germany have applied the conception of scientific *Encyclopædia* to the formal organism of the Sciences. Schelling's *Lectures on the Method of Academical Study* (1803) do not, however, pass beyond the circle of the Schools, and they are lacking in necessary clearness. Hegel's *Philosophical Propädeutik* and his *Encyclopædia of the Philosophical Sciences*, although flowing from one idea and connected throughout into a unity, go far beyond the living interests of the greater circle of readers by their very philosophic depth. And the same may be said more or less of various other philosophical works of the kind that need not be dwelt upon here.

## DEFINITION AND HISTORY OF JURISTIC ENCYCLO- PÆDIA AS A SCIENCE.

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**Definition.**—Juristic Encyclopædia is a systematic exposition of the science of Jurisprudence. It has to show what is the place and sphere of Jurisprudence within the whole domain of human knowledge, and to determine the necessary connection of its various members and parts according to the general idea of the Science. It is evident that the encyclopædic treatment of Jurisprudence must go hand in hand with the gradual development of the general encyclopædic treatment of the Sciences. The growth of the two springs from the same root, and thus juristic Encyclopædia is drawn into the process of the common movement of knowledge as one of its inseparable members. Its development, however, is conditioned by special causes that flow from the distinctive nature and the independent position of Jurisprudence. It is in connection with these that the following historical review will proceed.

### History of Juristic Encyclopædia.

1. When we go back to the dawn of culture in Greece, it need not surprise us that we seek in vain for an Encyclopædia, or systematic Science of Right. There was still awanting the condition presupposed by an Encyclopædia, namely, a developed system of Law with a defined exist-

ence of its own. The jural system of the Greeks had not yet independently separated itself from the other elements of the State. It coincided with the morals of the people, and had not yet obtained a scientific elaboration ; for the mobile spirit of the Greeks and the want of juristic terminology stood in the way of this being done. The solution of this problem was reserved for the Romans, who were pre-eminently the people of juristic science, and in this their whole intellectual effort was merged. Their system of Right and Law was developed through concrete realization ; and upon this broad basis grew up the longing to make the intellectual substance of the relations of life, and what was immediately demanded by the practical necessities, consciously their own. Moving in an unfruitful Eclecticism of thought, they gathered from the existing material what had fresh, living existence in time. In thus taking up the realities of Law into their system, they certainly escaped the danger of losing its connection with life, but they also had to lose the advantage of having it united into a whole by a fundamental thought. Hence arose the labour of compilation. The most conspicuous effort of the kind was that which is stamped with the name of the Emperor JUSTINIAN (529-534). A mirror of the jural conceptions and the legal realities of its age, it is also to be regarded as the first juristic Encyclopædia. The Justinian system, however, wanted the power of generalization. In its form it was only an aggregate of particular details. It realized merely in a higher degree what had been attempted before Justinian, and what was also attempted after him by other Emperors. This Collection was not only a Law-book but a Text-book ; and it served as a basis of juristic study in the public schools of Law.—The *Glossators* of the twelfth and thirteenth centuries attempted

to supply a general basis for this scattered material, and they made it their vocation in life to explain the Roman Law scientifically, and to apply it practically. Having undertaken these two functions, it might be expected that they were specially qualified to give a scientific expression to the juristic material of their time. Their instruction aimed at facilitating the understanding and at spreading knowledge of the Roman system of Right, and their literary activity was spent upon excerpts and general surveys of the system. But in doing so they lost the scientific foundation of the whole, and provided their contemporaries only with writings which were entirely subservient to the Justinian Compilation. They accepted, proved, and defended the Justinian positions; and while their productions in the dogmatic treatment of Right may indeed be regarded as the beginning of independent inquiry, they always bear the stamp of the Scholastic pre-possession on their brow. Hence their Encyclopædias, known under the name of *Apparatus* or *Summæ*, have the character of lifeless and laborious epitomes.—From this school, however, there arose a man thoroughly equipped with juristic knowledge, who moved in the sphere of Jurisprudence, after the example of the most famous teachers of the new University of Paris. At the same time as Vincent of Beauvais wrote his *Speculum majus*, he composed a *Speculum juris*, which was really the mirror of the practical Right of the civil and canonical Law of the age. This was *William Durantis*, who left the labours of the Italians, both formally and materially, far behind him, and secured for himself the honourable name of the 'Speculator.' Durantis has the same importance in the history of juristic Encyclopædia that attaches to his great prototype in the history of Universal Ency-

clopædia.<sup>1</sup> But we have nothing more than this to show from the products of the Thirteenth, or even the Fourteenth Century. The increasing enlightenment of the time had but little or even no influence upon Jurisprudence; and thus the universal Encyclopædia of Bandinus, entitled *Fons mirabilium universi*, which was produced under the influence of Petrarcha, passed over Jurisprudence without making an allusion to it. The science had then enough to do to keep its place. With scholastic verbosity, it plundered the writings of the Glossators and pursued its ineffective efforts to find a criterion for the determination of Right, till it fell into the most irrational casuistry, the creators of which have been well characterized by Cujacius in the words: 'Verbosi in re facili, in difficili multi, in angusta diffusi.'

2. The Science of Jurisprudence began to struggle out of this unsatisfactory state in the fifteenth century, when those great historical events took place by which the spiritual and social life of the peoples was transformed from its foundation, and which we are wont to designate as the beginning of the modern time. We may merely refer to the founding of Universities in the West, to the patronage of the humanistic movement by the house of the Medicis, to the struggle of the awakened reason against the pretensions of the ecclesiastical authority, and to the art of printing as the common literary vehicle of these tendencies. The fire which kindled the new culture also

<sup>1</sup> [Durantis died in 1296. His *Speculum juris* (in Four Books) was written some time after 1271. Walter considers that Friedländer and others overestimate the importance of the *Speculum* in relation to Juristic Encyclopædia. Savigny deals with the work of the French Bishop with his characteristic judgment and accuracy, in his 'History of the Roman Law in the Middle Ages' (Römisches Recht im Mittelalter), v. § 171-175. —TR.]

shed its warmth into the sphere of Jurisprudence, and men forthwith felt the emptiness of the Scholastic method, the insufficiency of its one-sided play with words, and its dialectical trivialities ; and they began to long for the solid knowledge that is only to be attained by philosophical and historical inquiry. The philosophy of the time, however, was at once too dependent and too feeble in creative power to take up this task of itself ; and so it went for counsel to Aristotle, and, in the struggle against the authoritative faith and scholasticism, it lost itself in an ineffective formalism and unfruitful abstractions. Thus it continued in great part to subserve the theological dogmatism, and it was unable to overcome the existing oppositions. Jurisprudence, in like manner, purified and reformed, laboured towards an independence which it could not attain, because, as standing in the service of practice, it could not break the chains of authority and custom, nor separate itself, either in the mode of its activity or its objects, from those of the preceding age. Its aim was not the spiritualized system of Right as a whole, which is only to be won by the aid of a profounder study, but a mere *Communis opinio* relative to the future as well as the past, and supported by a mass of citations and authorities. In other words, it aimed at determining an approximately correct Rule for the deciding of legal disputes as they might arise. Hence the wearisome uniformity of the juristic Encyclopædias that belong to the latter half of the Fifteenth Century, and partly also to those of the Sixteenth Century. Void of creative individuality, they sought, by external Aristotelian formalism, to conceal the internal poverty of their contents, and abused Dialectic by carrying it to excess. Thus fluctuating between what was ancient and modern, they did not even bring order into

what they regarded as the final goal of their activity—their exposition of the principal contents of the received system of Law. These Encyclopædias are void of all inner unity, and are but combinations of rules regarding the prudential relations of life for the young student. Their aim was to present what was practically useful; and hence, notwithstanding their philosophical ostentation, they warn the jurist against what was supposed to be an unfruitful occupation with all that lies outside the special circle of Jurisprudence.

3. Probably the first product of the modern movement was one of the first books printed before 1500, bearing the title *Viatorium utriusque juris*, written by Professor John Berbery.<sup>1</sup> About the same time, Baptista de Gazalupis s. Cujacalupis, Regent of the University of Jena, wrote his *Tractatus de modo studendi in utroque jure*, an Encyclopædia which is distinguished from its predecessor mainly by having a short bibliography.<sup>2</sup> Two other writings by the same author, of a similar kind, *De methodo juris studendi*, have been lost.<sup>3</sup> Hand in hand with these productions, we have an anonymous *Introductorium in utriusque juris libros* (Basil. 1513), and Mathæus' *De modo studendi in utroque jure* (Paduæ 1485), as well as Mopha's *De methodo ac ratione studendi* (Lugd. 1544). It would be equally uninteresting and unprofitable to take the trouble to make the succeeding series of works pass in detailed review. With an occasional difference in their

<sup>1</sup> [The *Viatorium* is called by Friedländer an *Incunabulum*, the technical term applied to the palæotypes, or earliest printed books, mostly prior to 1500.—TR.]

<sup>2</sup> The *Tractatus* was printed by itself at Basel in 1500, then in the *Vocabularium Juris* (Paris 1578), in *Sebastiani Brantii Expositiones* (Lugd. 1543), and in subsequent forms.

<sup>3</sup> Cf. Pancirolo, *De claris leg. interpret.* lib. ii. cap. 40.

mode of representation and in the hints and counsels they give to the young jurists, they may be regarded as representing, in their own sphere, the opposition between realism and humanism, that was carried at the time to an extreme. They take delight in dialectical gladiatorship and in a confusing mass of quotations, or in distinctions and definitions relating to practical Right and criticisms of authors. The leading titles of these works were: *Methodus*; *Ratio docendi discendique juris*; *Juris ars et scientia*; *Prolegomena juris*; *Epitome tyrocinii juris*; *Exercitatio juris*; *Parænesis de studio legali*, etc.<sup>1</sup>

Were we to sum up the efforts of the Sixteenth Century in one word, we might say that they were only *negative*. In the sphere of philosophy, after the chains of authority had been broken, the spirit of the age put forth its power in hostile discursive attacks upon the old Scholasticism. It tried one thing at one time, and another at another; attached itself now to a certain great name and again to a different one; but failed from the very distraction of its efforts to attain the strength

<sup>1</sup> The best of these works, such as those of Duarenus, Eguinarius, Corasius, Hegendorph, Beck, Massa, and others, are to be found, partly accompanied with critical annotations, in the following Bibliographies:—Wolfgang Freymon, *Elenchus omnium Auctorum qui in Jure claruerunt* (1579), Indice 2, cap. 6.—Lagus, *Methodica utr. jur. traditio* (1566).—Winckel, *Opuscula varia de ratione docendi et discendi jura* (Argentorati 1554).—Westphalen, *De origine et medela corruptæ Jurisprud. accedit Bibliotheca conciliorum ab Anno 1555 usque ad A. 1726* (Rost. et Lips. 1727).—The most important publication of this kind is the rare work of Reusner, the *Cynosura Juris* (Spiræ 1588). It contains about Twenty Encyclopædias of the Sixteenth Century. Its complete title runs thus: ‘*Xεπαγγεία s. Cynosura Juris, quæ est farrago selectissimorum libellorum isagogicorum de juris arte omnique ratione docendæ discendæque Jurisprudentiæ, a summis ac præstantissimis sæculi nostri ICtis conscriptorum.*’ The works contained in this collection are also to be found in Buder’s *Bibliotheca juris selecta* (Jena 1756).

of manly maturity and solidity. Jurisprudence shared in the same fate as philosophy. She would fain have torn herself from the grasp of the Glossators, in whom alone salvation was formerly found, and yet was incapable of standing upon her own feet. But by carrying out logically the resolution to receive nothing on trust or faith, she awakened the sense for classical inquiry, swept away much rubbish, and worked vigorously in union with philosophy in the way of preparing for the work of the Seventeenth Century. This age was to win the glory of resolving the problem how to connect what was already known and elaborated as fact, into permanence and inner unity. On this path, when it had once been opened, there met representatives of the most important European nations. England was represented in Lord Bacon, France in Descartes, the Netherlands in Spinoza and Grotius, and Germany in Thomasius and his associates. It is easy to understand that a movement connected with such names worked advantageously for the substantial development of Jurisprudence, and that it did not fail to further the advance of juristic Encyclopædia. *Hugo Donellus* gave the first proof that Roman Law could be taught in such a way that its formal cultivation could be subordinated to the free individuality of its expounder. Cujacius, stimulated by the labours of his predecessors, insisted upon a historical and classical study and exposition of Right in his Encyclopædia, entitled *De Ratione docendi Juris* (Argentorati 1585), to which he prefixed the striking motto, 'Multum crede mihi, refert, a fonte bibatur, quæ fluit an pigro, quæ latet unde lacu.' But while Cujacius renovated the study of Law by giving regard almost only to practice, Lord Bacon, in his master-work already mentioned, had a wider circle of vision.

In the Third Chapter of the Eighth Book of his *De Augmentis Scientiarum*, he brought it to the Consciousness of the jurists 'qui tanquam e vinculis sermo-cinantur,' that as the reform of the Sciences generally could only proceed from Philosophy, so was it with Jurisprudence, and that the previous attempts had not been able to effect a fundamental renovation either in the aim or the method of juridical science. Out of the fulness of his wisdom and experience of life, Bacon laid down rules regarding the Science of Law and its relation to the life of the people. His writings were the spiritual reflex of their age. The time itself was super-abundantly rich in events which were to drive the Science of Law out of the narrow circle of the *Juris utriusque*, in which it had hitherto been confined, into the domain of the moving life of the Nations; and thus it had assigned to it in great measure the compass and the sphere which it still occupies at the present day.

4. The lesser attempts that had been already made in the sphere of Public Right, were now followed by a series of fundamental investigations applied to all the questions in that department of the Science, evoked as they were by the penal ordinances of Charles V., by the religious struggles of the time, and by the revolt of the United Netherlands. HUGO GROTIUS is to be regarded as the scientific centre of this historical movement. By his great work, *De jure Belli ac Pacis* (1625), he gave a common principle of Right as a bond of union to the national individualities that had been torn asunder, and in his *Epistola de Studio politico ad Benjaminem Auberium*, *Legatum Regium*, he strove to lay a sure foundation for the study of Right. The so-called branches of Public Right, although not yet the subject of special lectures in

the Universities, thus became an object of literary study and an indispensable part of any encyclopædic exposition of Jurisprudence. *No period, indeed, was richer in juristic Encyclopædias than the sixteenth and seventeenth centuries*; and whoever examines carefully the juristic literature of this period, will not find it an exaggeration when we assert that the best minds of the time were almost exclusively devoted to this mode of scientific activity. Nor could they well do otherwise, because the condition of Law itself drove them to it as by an inner necessity, and because they had to make good what had been previously neglected. From the former ages they had received the existing elements of positive Law in motley disorder, and even without *external* connection; and therefore the twofold task remained for the Jurists to give at once a new vesture to this tradition, and to bring into proper order the new jural growths of their own age. They almost all agreed that this end could only be attained by means of a strict and logically maintained effort. Thus arose in the Sixteenth Century the so-called *Methodists*, whose efforts were directed to introducing the clearest possible order into the tangled web of the material of Law, both with reference to Jurisprudence as a whole and to its several parts. The leaders of this movement, in whose footsteps came a rich train of followers, were the French Jurists *J. Corasius*, Senator of Toulouse,<sup>1</sup> *Gregorius Tholosanus*,<sup>2</sup> and the Friesian,

<sup>1</sup> Corasii Iureconsulti, *De Juris Arte Libellus*. Colon. 1563. [Coras was born c. 1512. The *Libellus* only deals with the Roman Law.—TR.]

<sup>2</sup> Petri Gregorii Tolosani, *Syntagma Juris Universi atque Legum pene omnium gentium et rerum publicarum præcipuarum, in tres partes digestum in quo divini et humani juris totius, naturali ac nova methodo per gradus, ordineque materia universalium et singularium simulque judicia*

*Joachim Hopperus* (1576).<sup>1</sup> Besides these, M. Wesenbeck, in his treatises, *De juris arte et scientia comparanda prolegomena*, and the *Epistola de studio juris recte et feliciter instituendo*, and many others, followed on the same path.<sup>2</sup> Their writings, aiming equally at subserving the interests of the school and of life, however much good they may have done, did not exhaust their task, because they regarded the inner reciprocal relation of the several branches of the science as a secondary consideration, and they often sacrificed it to an arbitrary external arrangement. Thus these productions became either meagre excerpts, poor in substance, or thick voluminous compilations. *The beginning of the Seventeenth Century* offers us nothing better than this. An itching after original systems brought with it a flood of Encyclopædias of which the most important are enumerated in Buder's Bibliography.<sup>3</sup> Most of them, however, had at least the merit of having striven for simplicity as against what had become antiquated and unusable; but they turned their own weapons against themselves, for while making the form of the science the subject of chief importance, they failed to recognise that it is only its inner unity that can produce the greatest possible perfection in its form. Accordingly, while they very frequently put the

*explicantur.* (Lugduni 1582, fol. Fifth and last ed. Frankfurt 1611.) [Walter says that the great collective system of Gregory of Toulouse is more scientific than the *Speculum* of Durantis.—Tr.]

<sup>1</sup> *Joachimi Hopperi Phrysii Iurisconsulti, De Juris Arte. Libri tres. Lovanni 1555.*

<sup>2</sup> Their works are found in the Collections of Reussner and Buder, *v.s. Note.* [Walter also refers specially to the work of Althusen as important. *Johan. Althusii, IC. Dicæologiæ Libri tres, totum et universum jus, quo utimur, methodice complectentes. Francof. 1618.—Tr.*]

<sup>3</sup> *Buderi De ratione et methodo studiorum juris illustrium et præstantissimorum ICtorum selecta opuscula. Jenæ 1724.*

individual details together in a fragmentary way and into haphazard divisions, their whole structure became a loose, unconnected aggregate of particulars, which only confused the beginner.

5. The writers of *the second half of the Seventeenth Century* learned from the errors of their predecessors, and in these fifty years we find encyclopædic attempts of every kind gathered together as in a focus. It is a pleasant task to examine the succession of them, because we find, among their authors, thinkers who felt the emptiness of the previous modes of exposition, and who actively diffused light and stimulus on all sides. These men are the milestones in the history of Jurisprudence as a science, and they are to be reckoned through a whole generation. Among them stand conspicuous the triumvirate, PUFENDORF,<sup>1</sup> LEIBNITZ,<sup>2</sup> and THOMASIUS.<sup>3</sup> Inheriting from Descartes and Spinoza the fundamental principles of an independent philosophy, and important historical material from Bacon and Grotius,<sup>4</sup> they opened the way to a *rational treatment* of juristic Encyclopædia. *Pufendorf*, however, in this relation, is not entirely undeserving of the expression of Leibnitz, ‘parum juris-consultus !’ from

<sup>1</sup> *Elementa Jurisprudentiae universalis*, 1660.

<sup>2</sup> *Nova Methodus descendæ docendæque Jurisprudentiae, Ex artis didacticæ principiis*. (Frankf. 1668. Also with a preface by Wolf, Leipzig. 1748.)

<sup>3</sup> *Cautelæ circa præcognita Jurisprudentiae, in usum auditorii Thomasianni* (Halæ 1710). Also his ‘Summary Sketch (*Entwurf*, etc.) of the fundamental doctrines which it is necessary for a Student of Law to know and to learn at the Universities’ (Halæ 1699). The first-mentioned work also appeared in German, under the title, *Höchstnöthige Cautelen die ein Studiosus Juris zu beobachten hat*. Halle 1713.

<sup>4</sup> Pufendorf, in his preface, says: *Sed et illud hic monendum fuit, multum nos desumissem ex mirando illo opere de Jure Belli ac Pacis, viri incomparabilis Huyonis Grotii.*

the way in which he puts together abstract jural conceptions, which have a certain one-sided character, and which are employed to conceal the internal want of unity. He tries to blind us by the semblance of a merely external method, and he pays us off with the quintessence of his philosophy in place of a scientific permeation of the material of Law; and on the whole he thus produces only a very defective Encyclopædia. *Thomasius*, imbued with living faith in the power of thought, wrote his *Summary Sketch*, which was the first academic writing published in the German language, and pressed the whole wealth of history and of life in his own way to his heart. Apart from the more incidental merit that he was the first, and, so far as we know, the only one who has ever lectured for four successive sessions on the subject of Universal Encyclopædia (1699),<sup>1</sup> he had the power of surveying the great sphere of all knowledge and life from a standpoint of his own that raised him above the errors and prejudices of his time; and he showed that he possessed an abundance of positive and especially of juristic knowledge. Laying his foundation on the principle 'that philosophy ought properly to be a guide to the true wisdom and the common instrument of the three higher academic Faculties,' he reared a structure which we still contemplate with astonishment to-day. He comprehended the multiplicity of his experiences, both of knowledge and life, in consciousness, beheld the peace of the spiritual totality of existence in its unity, and combined with the inexorable criticism which he directed against all antiquated

<sup>1</sup> Falck mentions that Martini delivered a series of Lectures on this subject—*Collegium isagogicum in universam Jurisprudentiam*—at Kiel in 1685.

pedantry, a conciliatory gentleness of sentiment towards the students of science. He arranged the scattered material of his subject under general laws, but it is the great and essential defect of his encyclopædic method that he only *arranged* it by reducing what was given as fact, under his own ready-made categories ; and he was therefore reflective and not speculative.

The comprehensive genius of *Leibnitz*, to whom the first juristic Encyclopædia has been erroneously ascribed, strove mainly to remove those defects of Method of which Thomasius had asserted 'that they only led the students of Law astray.' Animated with an equal love for all scientific efforts, and distinguished in mathematics as the 'Newton of the Germans,' Leibnitz, when but a youth, entered on a campaign against the previous method of teaching and learning Jurisprudence. The confusions of the time in the sphere of Right and Law, awoke in him his permanent favourite thought of a scientific revision of the *Corpus juris Romani*,<sup>1</sup> and the production of a universal Law-book for Germany. Soon coming to see that both of these ideas would have to remain but pious wishes, he endeavoured to contribute in his *Nova Methodus*<sup>2</sup> what he could give of his own to the renovation of the study of Law. As it had been pre-eminently the Civil Law, for the acquisition of which the various methods had been hitherto established,<sup>3</sup> it was especially against their stiffness and inflexibility that he took the field. But while he advocated a *didactic* Method, he only altered the

<sup>1</sup> *Corporis Juris reconciliandi Ratio*, 1669, 1671.

<sup>2</sup> *Nova methodus discendæ docendæque Jurisprudentiæ*, 1767.

<sup>3</sup> The best known of these was the *Ramistic* Method, derived from Ramus, the French Dialectician of the beginning of the sixteenth century. It was also called the *Methodus Causarum* and the *Methodus dichotomica s.*

name, and not the thing itself, with the difference that he attempted in the whole science of Jurisprudence what those whom he attacked had only proposed to do in its several branches. While Thomasius only arranged and sifted the material then presented, and thus made it more intelligible for the student, Leibnitz laboured to compress the historically given material into the definitions and precepts of his own philosophy, and he thus fell into a formalism which, so far from bringing simplicity and clearness into the mass of the things with which he was dealing, only increased the confusion.<sup>1</sup> The end which he proposed to himself was great, being ‘delineare *ICtum*<sup>2</sup> perfectum et vias designare ad perfectionem grassandi’; but however great it was, and notwithstanding his originality of connection and the independence of his combinations, he could not obtain for his age the intellectual mastery over the material of Right and Law which it required. He did not even reach what he originally intended as a ‘Compendium discedendorum,’ because he did not construe the totality of Right from within according to one principle, but proceeded from without, and mostly derived his principles of division from the material itself. Hence even his Division of Jurisprudence was borrowed from the theologians. It thus fell into *didactica, historica, exegistica, et polemica*; and according to his own assertion, ‘ex his didactica et polemica proprie sunt partes jurisperudentiae, historica vero et exegistica sunt requisita tantum.’

*tabellaris.* Its leading points were expressed in the following mnemonic lines :—

Præmitto, scindo, sumo casumque figuro,  
Perlego, do causas, connoto et objicio.

<sup>1</sup> As in the table appended to his work.

<sup>2</sup> [‘*ICtum*’ = *Iuris-Consultum*.—TR.]

How came it then that these disciples of the *School of Natural Law*, specially called as they were to philosophy, produced no System of Jurisprudence arising and flowing from a single principle? This fact is explained by the nature of their tendency in Jurisprudence. In their time the feeling of dissatisfaction with the existing state of the science of Law, was vividly and practically felt. Then they appeared with the certainty and boldness of a science that had confidence in itself; they sought to liberate the German nation from the fetters of the historical material, and they thus took a negative attitude towards it by excluding what the age condemned, separating out particular masses of the whole, and combining from the various parts of positive Right and Law whatever naturally cohered. At all events, they thus laid the foundation of an organic articulation of the various parts of the science, and a systematic delimitation of its branches. But because the essential characteristic of the whole School was intellectual reflection, it destroyed by its empty abstractions the living connection of the elements of the jural system, and articulated the branches of the science merely by reference to their contents or to the sources of Law, and not according to a speculative principle.

Animated by the influence of this School, encyclopædic attempts were made on all sides, some of them contemporaneously, others of them later, and with more or less success, according as they adopted the advantages or the errors of the School. Most of these Encyclopaedias will be found mentioned in the bibliographies already referred to, especially in Brunquell's *Opuscula*, and in the *Bibliotheca juridica* of Lipenius—and a short historical and literary outline is generally prefixed to the quotation of them.

The best of them all—as is also held in the judgment expressed in the academic *imprimatur* prefixed to it—is that of Braun (Professor at Salzburg), entitled *Jurisprudentia in genere ac specie nova et scientifica methodo publicata* (Salisburgi 1687). We may here pass over the less important works of the kind, and merely allude to Lynker,<sup>1</sup> Huber,<sup>2</sup> Van Eck,<sup>3</sup> Balduin,<sup>4</sup> Seebach,<sup>5</sup> Carpzov,<sup>6</sup> Kestner,<sup>7</sup> and Hunnius, who *first* chose the designation ‘Encyclopædia.’<sup>8</sup>

The writers of the *Eighteenth Century* thus found the paths opened, upon which they could advance, the various branches of Jurisprudence as a science being exhibited in their mutual relations and examined in their principal contents. The previous attempts to introduce a strict method made it easier for them to determine the relations of their science, and to strive with concentrated energy towards the goal set before it. This goal was the unity of the departments of Jurisprudence and the exact demarcation of the scientific domain of Right. The aspiration to discover a common centre for the whole, called forth in wonderfully rapid succession a multitude of Encyclo-

<sup>1</sup> *Introductio in selectam Eruditionem.—Ratio docendæ discendæque Jurispr. Rom. Germ.* (Jenæ 1686). *Instructorium Forense*, 1690, 1698.

<sup>2</sup> *Diatribe de ratione docendi et discendi Juris.* Leovard 1677. Also Ed. by Zach. Huber. Franc. 1684, 1696.

<sup>3</sup> *Oratio de ratione studii Juris recte instituendi.* Traj. 1693.

<sup>4</sup> *De historia universa ejusque cum Jurispr. conjunct.* 1693, 1698.

<sup>5</sup> *Introd. in Juris et Politices atrium per viam logices.* Viteb. 1697.

<sup>6</sup> *Recta Methodus de studio Juris recte et feliciter instituendo.* Dresdæ 1675.

<sup>7</sup> *Prudentia studii Juris.* Rintel. 1699. *Introductio ulterior ad studium Juris.* Francof. 1704. *Compendium Juris universi, seu Jurispr. posit. seculo accommodata.* Rintel. 1707.

<sup>8</sup> *Ulr. Hunni Encyclopædia Juris universi.* Colon. 1683. [Hunnius died in 1636. His *Encyclopædia* was published after his death.—T.R.]

pædias, which—to say nothing of their unclassical Latin and their inelegant German—regarded method as an empty frame into which anything could be put at will. Hence they did not produce anything like a single connected organism, any more than did the authors of the numerous Universal Encyclopædias of the time,<sup>1</sup> and they only sought to supersede their predecessors, whose slavish imitators they were, by piquant and often ludicrous titles.<sup>2</sup> Thus from the want of one common bond wound round all the branches of the science, they were compelled, in their embarrassment, to refer essential parts of the whole to a special Appendix designated ‘*adminicula juris*.’ This unsatisfactory and unsuccessful attempt to methodize,<sup>3</sup> and to lay down rational precepts for the proper conduct of study,<sup>4</sup> was accompanied with the effort,

<sup>1</sup> E. J. Kemmerich's *Neu eröffnete Akademie der Wissenschaften*. Leipz. 1711-14.—Lasius' *Harmonische Schlusskette der Gelehrsamkeit überhaupt*. Soran 1727.—Kellenberg's *Vernünftiger u. erfahrener akad. Wegweiser*. Leipz. 1726.

<sup>2</sup> Bierling, *De eruditione politica oder wie man cavalierement studieren soll*. Rintel. 1708.—Hertel, *Pyxis nautica navigaturientis per immensum juris pelagum*. Jenæ 1711. *Laterna Magica*. Francaf. et Lips. 1743.—Marbach, *Introitus ad jurisprudentiam apertus*. Jenæ 1717.—Stryk, *Chartæ lusoria juridicæ sive compendiosa institutio leges civiles per ludum et jocum addiscendi*. Halæ 1709. (Juristic playing cards, etc., in 36 sheets !)

<sup>3</sup> Ickstadt, *Meditationes præliminares de studio Juris ordine atque methodo scientifica instituendo*. Würzb. 1731, and in his *Opuscula*, I. 1.

<sup>4</sup> As in the anonymous Kluge *Conduite eines künftigen, Gelehrten, insbesondere Rechtsgelehrten*. Frankf. Leipz. 1713.—Hering, *Nothw. Vorbericht u. Unterweisung vom Studio Juridico*. Stettin 1720. (Contains as an Appendix Leibnitz's letter to Kestner, *u.s.*)—Kallenberg, *Akad. Wegweiser zur wahren Weisheit u. Klugheit wie auch gründl. Rechtsgelehrsamkeit*. Leipz. 1724.—Kurze Abhandlung von der Methode die Rechte zu erlernen, von S. Jena 1648.—Hoffmann, *Nöthige u. nützliche Grundsätze der Rechtsgelehrsamkeit*. Frank. Leipz. 1743.—Schmauss, *Entwurf eines Collegii juris præparatorii*. Göttingen 1737.

inaugurated by Leibnitz, to mould the *Corpus juris* methodically into another form, and it was even more fruitless of result;<sup>1</sup> or again, it ran parallel with the desire to comprise the whole of the valid rights and laws in one book.<sup>2</sup> This latter tendency was carried out to the utmost by Nettelblatt, a follower of Christian Wolf, who himself wrote a treatise that is to be found in Cramer's *Opuscula de necessitate Methodi Scientificæ*. Nettelblatt plays the same part in Jurisprudence that his master did in Philosophy, and the controversy to which he gave rise regarding the method of Jurisprudence, is a faithful reflection of the conflicts that were waged around the Leibnitzio-Wolfian philosophy.<sup>3</sup> As Wolf sought to give a mathematico-scientific form to Philosophy, Nettelblatt sought to give a similar form to Jurisprudence; and it may be said that almost his whole life and efforts were spent in the systematization and the encyclopædic representation of Jurisprudence. By his skilful defence of the *demonstrative Method*, he threw down the glove in challenge to the representatives of the doctrinal Methods

<sup>1</sup> *E.g.* Berger, *Corpus juris reconcinnatum*. Frankf. et Lips. 1767, 1768.

<sup>2</sup> Titius, *Juris Romano-Germani Lib. xii.* Lips. 1709, 1724.

<sup>3</sup> Nettelblatt's works in this department are as follow:—*Systema elementare universæ Jurisprudentiæ positivæ communis imperii Romano-Germanici usui fori accommodatum*, 1729, 1762.—*Præcognita eruditionis generalia*, 1755.—*Præcognita jurisprud. posit. gen.*, 1759.—*Introd. in Jurisp. pos. Germ. commun.*, 1761.—*Nova Introd. etc.*, 1772.—*Systema elementare doctrinarum Jurisprudentiæ pos. Germ. comm.* 1781.—*Unvorgreifliche Gedanken von dem heutig. Zustände d. bürgerl. u. natürl. Rechtsg. in Deutschland*, etc., 1749.—*Politische Vorschläge zur Verbesserung der jur. Vorlesungen auf hohen Schulen*, 1750.—*Von dem ganzen Umfang der natürl. etc., Rechtsgel.* 1772. *Abhandlung von der prakt. Rechtsg. etc.*, 1764. Besides many scattered writings and reviews and a 'Program' on the teaching of Law, Halle 1744.

practised before and in his time ; and against the prevailing confusion in the jural life of the age, he hurled the words ‘jurisprudentiae divisio, a concreto sumta, omnis confusionis principium est et ad eos pertinet, qui vel tractatus vel indices scribunt !’ The Jurisprudence of that age was represented as having gone back, in so far as ‘the positive material of legal Right had been elaborated for practical ends into an apparent whole without critical examination and separation, so that what was heterogeneous and incompatible had been conjoined together ; one jurist had handed on the dead mass to another ; and by every hand new errors were added, and even the best of them had not been able to withdraw themselves from the traditional authority of a false method.’ This bitter polemic against the prevailing want of thought, and against the teachers and text-books that were regarded as its source, fills many pages of Nettelblatt’s writings. In estimating their value we would gladly overlook certain absurdities, such as the Chapter on the *Jus antediluvianum*, if only we had been indemnified by a really systematic arrangement of the Science as a whole. It is undeniable that they are fitted to give the students an impulse towards clear thinking and the appropriation of universal culture, while they also contain hints for the guidance of the teacher and legislator in aiming at a better state of Law. But with all this, these writings leave us unsatisfied in regard to the solution of their special problem, the way to which was barred by Nettelblatt himself when he accepted the view that ‘omnis methodus nonnisi formalia conseruit.’ Hence the result of his great endeavours was not a system, but a systematic dissection, and the unity that was aimed at was lost in mere logical formalism.

6. Immediately thereafter, there again emerged a multitude of Encyclopædias composed according to the method of Nettelblatt.<sup>1</sup> This literature grew to a great extent, accompanied as it was in the first half of this period with dull treatises about the utility of certain Sciences for the Jurist, and with Jeremiads about the decay of juristic Science,<sup>2</sup> and the gulf that lay between theory and practice. The writers dabbled in one thing and another, great or small, till at last they were brought again out of this methodizing formalism to the highway of the practical requirements of the time.

There are again three important names to which this new movement was attached : Senckenberg,<sup>3</sup> Moser,<sup>4</sup> and Pütter.<sup>5</sup> Trained in the School of practical life, and able cultivators of public Law, these three representative thinkers at once confute and mutually complete each other. While Pufendorf, Thomasius, and Leibnitz enabled the juristic world to enlarge its circle of vision and carried their age from the narrow round of its own views

<sup>1</sup> Beckmann, *Gedanken vom Reformiren des Rechts*. Halle 1749.—Trier et Sell, *Triga Opusculorum*. Colon. 1750.—Gonne, *De invertendo Jura practandi ordine*. Erlang. 1756.—Madhin, *Gedanken . . . besonders in der Rechtsgelehrtheit*. Halle 1758.—Moyen, *Anleitung z. Erlernung der Rechtsgelehrtheit*. Giessen 1752.—Lobathan, *Abhandlung*, etc. Cöthen 1774, etc. etc.

<sup>2</sup> A whole series of such may be found in Nettelblatt's *Syst. doctr. prop. Sect. I., II., III.*

<sup>3</sup> De ordine Collegiorum juris theoreticorum et practicorum. Gött. 1735.—Methodus Jurisprudentiæ. Francof. 1756.—Vorläufige Einleitung zu der ganzen in Deutschland üblichen Rechtsgelehrsamkeit, 1762–1784.

<sup>4</sup> Allg. Betracht, über das Studieren, besonders der Rechte.—Anleitung zu dem Studio Juris. 3rd Ed. Jena 1743.

<sup>5</sup> Entwurf einer juristischen Encyclop. Göttin. 1757.—Neuer Versuch einer jur. Encycl. u. Methodologie, 1767.—It is often erroneously stated that Stephan Pütter († 1807) was the first to introduce the use of the term 'Encyclopædia'; but this was due to Hunnius, as mentioned above.

of Law into the centre of a magnificent scientific struggle, this later trio represented a reaction, called forth in an intelligible way by the mistake of the adherents of the School of Natural Law, and it was unmistakably directed against a confusing and unpractical mode of philosophizing.—Senckenberg († 1768) wrote his treatise, not for the special student of Law, but as he says, for his son, a boy of eleven years, and he thus impressed upon it, both in matter and form, the stamp of a Catechism of Law. Moser's Introduction, again, appears as a rational Adviser, in which he embodies the results of an experience of seventeen years, in vivid incisive language. Pütter, on the other hand, combines with these advantages that of an appropriate arrangement and a lucid exposition, and he has also embodied in a separate division the so-called Methodology, which the other two had variously mixed up, and which received its distinct formation from him. He thus became the father of a method which still prevails in the present day, and it is therefore so far correct to date from him the beginning of juristic Encyclopædia in the *current* sense of the term.

In what then did the epoch-making characteristic of the Encyclopædias of these three representatives consist? It lay in the fact that they detached themselves from the watery verbosity of their predecessors, and gave up the attempt to comprehend the living connection of Right by arbitrary combinations. Without assuming a hostile attitude towards the preceding philosophical efforts, as might have been expected, they advanced with the reasonable demand that the true position and value of Jurisprudence should not be handicapped by a straining after barren ideals of the Science. They had a right to repudiate the results of the philosophizing spirit when

they were found to be in contradiction with the fresh life of the time. Their efforts were therefore directed to further the comprehension of the existing Right and Law, and especially to bring its national elements into the consciousness of the people, as well as to contribute to the reanimation of neglected branches of the Science. This mode of progressive formation, demanded a knowledge of the concrete elements of the time rather than an organism of developed conceptions. While they renounced the attempt to unfold such an organism, they wished in no way to detract from the power of philosophy ; yet, because they knew that they could not advance with an articulated and completed system beyond the achievements of their predecessors, they united and concentrated their power in a universal outline of the doctrine and life of Law ; and this end they completely attained without engaging in a mere conflict about principles. Their object was to comprehend the particulars of legal Science under general points of view. In this they succeeded,— and it was all they achieved.<sup>1</sup>

The History of juristic Encyclopædia till near the end of the Eighteenth Century, thus presents us with a series of attempts that range between the extreme of a purely philosophical method and merely empirical expositions of the subject. All these various modes of representation have their historical justification, some of them in pressing towards a central speculative principle, and others by laying immediate hold of what

<sup>1</sup> Senckenberg thus describes this method (Cap. VIII. § 49, 50) : ‘ Every man ought properly to be a jurist. Hence it behoves to make jurisprudence not difficult but easy, that even citizens and peasants in any case might know it, and every one be able to judge of it according to his circumstances.’

was required by the practical want of the time. Neither of the methods could, of course, suppress the other, and it remained for the following age to combine them in scientific unity. The transition to this subsequent mediation was formed by a series of writings, some of which are very noteworthy,<sup>1</sup> and the higher principle by which it was to be effected received its special expression from Kant<sup>2</sup> and his successors.

7. KANT is the centre of the spiritual movement which took its rise towards the end of the last century, around which all the positive and philosophic efforts succeeding him have turned. He aimed at bringing life into harmony with Science, and both with Reason. It thus became necessary for him to take up a *critical* standpoint in consequence of so much that was untenable having been derived from the immediately preceding period ; and in the twofold relation to life and science his work was at once to sift and to purify. The predecessors of Kant, the so-called Empirical Philosophers, had made the attempt to bring the contents of life and Scientific Knowledge into the form of general ideas and propositions, but these

<sup>1</sup> Boels, Plan einer neuen Art, die Rechte brauchbar zu lehren oder die jur. Werkstube. Frankf. Leipz. 1778.—Winkler, Richtiger Zeiger der Hauptsnldigkeit eines Lehrers der Rechte. Grätz. 1768.—Matthäi, Betrachtungen über das Studium der Rechtsg. Breslau 1772.—Eybel, Adumbratio Jurispr. Vienn. 1773.—Scharf, Unterricht, etc. Jena 1734.—Seip, Vorschläge. Gött. 1752.—Schwarz, Erinnerungen. Lüneb. 1778.—Meister, Ueber das jur. Studium. Berlin 1780.—Tevnar, Versuch über die Rechtsgel. Leipz. 1777.—Brnnquell, Isagoge in univ. jurispr. Halle 1774.—Schott, Entwurf einer jur. Encyclopädie u. Methodologie. Leipz. 1771 (6th Ed. by Kees, 1794). The best and most widely used text-book of its time.

<sup>2</sup> [Kant's position and the relative literature will be found indicated in the translator's recent Edition of Kant's *Philosophy of Law*. T. & T. Clark, 1887.—Tr.]

were only one-sided reflex conceptions abstracted from the perception of particular facts, and they wanted the characteristics of Universality and Necessity, and consequently of Certainty. Kant passes beyond this stage of knowledge with the assertion that the criterion for the knowledge of the world lies in ourselves. This knowledge must be determined by us, and not conversely. In this way he set the principle of the independence of Reason upon the throne, and recognised it to be the function of Reason to mediate between Knowing and Being. His endeavour to banish contingency and uncertainty was, however, nullified by himself, when he asserted on the one hand that Reason is not able to solve the contradictions of the world, and again that it is unable to comprehend anything which transcends or lies beyond the actually present world. Hence, with Kant, Reason is merely a faculty of Reflection in the higher sense; it is a practical Understanding which has merely to apply its own laws to the facts of experience.

The result of the philosophy of Kant, may accordingly be expressed as the application of the principle of '*formal unity to the simplification and systematizing of experiences.*' The Kantian system, therefore, exercised less influence upon the treatment of the Sciences and upon Encyclopædia, in so far as it left the *method* of the common knowledge entirely uncontested. On the other hand, its epoch-making importance arose from 'the independence of the self-apprehending thought as the principle of Freedom which, although it was not capable of developing anything out of itself, yet absolutely refused to admit the validity of anything which has the character of externality.' This Principle was the germ of that fruitful revolution in knowledge and life which found its theo-

retical expression in the blossoming classical literature of Germany of the time, and whose practical result is to be regarded as embodied in the subsequent reform of the political life. Thus did Kant set everything into most animated motion in the camps of all the divisions of the intellectual army, and they all put themselves under his banner. His rationalism contained not only the germ of a new cultivation of the branches of Jurisprudence, for which philosophy is an indispensable basis, but even in the purely positive departments of the Science, new creations were reared upon the foundation already laid. The positive material was critically sifted, and it was recognised as the function of Science to reconstruct the scattered accumulation of Private Right into an organic whole. But, on the other side, the attempt was made to transplant the Kantian ideas into the subject; and in consequence, and under the favouring influence of the time, two methods became predominant in Jurisprudence, the one of which may be designated as the *philosophico-practical*, and the other as the *philologico-historical*.

Notwithstanding their inner difference, these two tendencies had in common that mode of treating the subject which presented an orderly exposition of the Principles of Right from universal points of view, and which was opposed to the earlier inflexible arrangement of the text-books according to the so-called legal order. Thus the scientific reconstruction of Jurisprudence, which Leibnitz had long before attempted, became a fulfilled truth. Yet the Kantian philosophy advanced to nothing higher than a certain formalism within which it was necessary for Science to move. This character was also communicated to the juristic Encyclopædias of the time, which,

far from attaining to a genetic production of the science, constrained the newly-gained results into the Kantian forms of thought. In the most of them there is a certain run taken through the principles of the Kantian Philosophy, and this is, in fact, their only point of pre-eminence over the Encyclopædias of Pütter's School. In this relation Kant is not yet antiquated at present.<sup>1</sup> This formalism, which can never produce a work that flows in the current of one stream, shows itself most clearly in the traditional division of the subject into Encyclopædia and Methodology, from which very few have yet detached themselves. From that time is also dated the absurd division into *external* and *internal* Encyclopædia, which unfortunately still maintains its place. There is erudition enough found in the works

<sup>1</sup> The most noteworthy among the works of this school are the following:—Gildemeister, *Juristische Encyclopædie u. Methodologie*. Duisberg 1783.—Reitemeier, *Encyc. u. Geschichte der Rechte in Deutschland*. Götting 1785.—C. G. Richter, *Oratio de intereuntis jurispr. humanioris causis recitata*. Lips. 1786.—Terlinden, *Versuch einer Vorbereitung, etc.* Münster 1787.—Tafinger, *Encyc. u. Geschichte der Rechte in Deutschland*. Erlangen 1789. Tüb. 1800.—*Versuch einer jur. Methodologie*. Tübing. 1796.—J. C. J. Meister, *Ueber das jur. Studium*. Berlin 1780. *Vorerkenntnisse u. Institut des positiv. Privatr.* 1810.—*Snetlage, De Jur. Univer. ratione*. Halæ 1788. *Program de methodo jur. docendi*.—Schmalz, *Encyclop. des gemein. Rechts*. Königs. 1790.—*HUGO, Lehrbuch der jurist. Encyclopædie*. Berlin 1792. (8th Ed. 1835.)—Dabelow, *Einleitung in die Deutsch. pos. Rechtsw.* Halle 1793.—Crusius, *Vorerkenntnisse für Anfänger in der Rechtsgewissenschaft*. Hannover 1795.—Eifenhart, *Die Rechtswissenschaft nach ihrem Umfange, etc.* Helmstädt 1795, 1804.—Zachariä, *Grundlinien einer Wissenschaft jur. Encyclop.* Leipz. 1795.—Hufeland, *Præcognita*. Jenæ 1795.—*Abriss der Wissenschaftskunde u. Methodologie d. Rechtsg.* Jena 1798, 1803. *Lehrbuch der Geschichte u. Encycl. aller in D. geltend. pos. R.* 1796.—*THIBAUT, Jurist. Encyclopædie u. Methodologie*. Altona 1797.—Kohlschütter, *Prop. Enc. u. Method. der pos. Rechtsw.* Leipz. 1797.—*Kurze Anleitung zu einem gründl. Studium der Rechtsg.* (Anonymous.) Lüneb. 1798.

referred to, but no rounding off, no completion, no unity. To these conditions they were prevented attaining mainly by following the division of knowledge into *rational* and *empirical*, which proceeded from the very essence of the Kantian philosophy.

Fichte and Schelling<sup>1</sup> aimed at removing this dualism from Philosophy, and they both strove to reduce philosophical knowledge to an independent absolute principle. This principle was in their view the personality in which thinking and being are identical, and in which the latter is produced from the former. So far as our purpose is concerned, we may put these two philosophers on the same line, although Schelling afterwards but too often changed his system. Both start from the demand that knowing shall be absolutely *one*, because its aim is nothing else than the logical comprehension of the 'One in All.' Their philosophy has, therefore, had an advantageous influence, in that it strove to work the whole practical and scientific life into a living unity, and hence it was joyously greeted on all sides as healing the breach between science and reality that had been produced by the Kantian Criticism. The productive activity of the Ego—which in Fichte is the individual Ego, and in Schelling the absolute or Divine Ego—is the infinite source of all knowing; and all that is confused and divided in detail, finds in this Ego its unifying centre. Can there be a surer foundation on which to build up a system of the sciences than this?

Apart, however, from the fundamental and essential defect in the way in which they assume and establish their philosophical principle, which cannot be closely

<sup>1</sup> [For the works of Fichte and Schelling on the Philosophy of Right, see the Preface to Kant's *Philosophy of Law*.—Tr.]

examined here, both Fichte and Schelling merely put forward the conception of a common starting-point of all knowledge; but the realization of this conception was not unfolded and established by them. They only asserted that it ought to be so, but they did not show how we have to proceed in order to begin and attain to the end in view. The ideas of Fichte, indeed, springing as they did from the unlimited freedom of man, winged their way into the relations of life and the hearts of men, and forthwith all the departments of knowledge in their positive contents were kindled anew by them. The form of science, however, remained the same as of old, and the comfortless distraction arising from the divided details of the earlier time still waited in vain for the fertilizing touch of harmony. In the sphere of Jurisprudence, many an accumulated error was set aside, many a better conviction was awakened, and yet on the whole the empirical mode of mastering the wealth of the science continued to prevail even in juristic Encyclopædia; because, although it was recognised that the science was an organism, it was not yet understood how its several members were to be brought into their proper place and connection by the new principle that had thus been won.

Schelling's 'Lectures on the Method of academical Study,' delivered at Tübingen in 1802,<sup>1</sup> had for their object the reanimation and better guidance of Science. Their aim was to improve upon the mechanical industry and the mere mnemonic mode of acquiring science, by a universal course of instruction regarding Academic Study, and to develop the consciousness that the particular has

<sup>1</sup> [Vorlesungen über die Methode des Academischen Studiums. Sämmtl. Werke, I. Bd. V.]

its value only by connection with the universal. 'The knowledge of the organic whole of the sciences ought to precede the special cultivation of any one branch or side of them. Whoever devotes himself to a particular science should learn to know the place which it occupies in this whole, and the particular spirit which animates it, as well as the method by which it is to be cultivated. It is by this method that it is connected with the harmonious structure of science as a whole, and it is therefore also a guide to the manner in which the student has to proceed with his science in order not to serve it as a slave, but to think of it as a freeman, and to deal with it in the spirit of the whole.' The good which was achieved by these Lectures was limited, however, to the incisive inculcation of the truth, that without a knowledge of the living connection of all the sciences any method of guidance must be dead, one-sided, and limited, and that in order to rise to a magnificent view of knowledge, the student must necessarily turn to Philosophy. The so-called 'Absolute' is the presupposition of knowledge, and all particular knowledge is related to it as the Ideal. This is the foundation-stone of the whole system. From this ethereal height, however, Schelling did not descend to the real world ; his assertion that the Ideal is likewise the Real, remained a mere assertion, because the whole movement of the discussion failed to furnish the proof of it. Schelling himself says he despairs of being able 'to enter now into the particular parts of Academical Study, as it is not possible to rear, as it were, the whole of the structure upon the fundamental principles laid down, without at the same time following out the ramifications of science and construing it as an organic whole.' Although he starts from the point of view of giving a

representation of the connection of all the sciences with each other, and of the objectivity which this internal organic unity has obtained by the external organization of the Universities, he yet presents no System of Science deduced in a strict way from his fundamental principles. In the beginning of the Lectures we have the pretension of unconditional Unity put forward, and at the end of their external sequence we are presented with the old divisions of positive and not-positive knowledge, and such like. It is therefore easy to understand why the juristic writers of that time were not induced to give up their previous methods by an attempt which thus only combined a play of empty ideas with uncertain assertions. Hence, they either held fast by the standpoint of Kant, and, with the aid of a few formal principles, wrote what may be called '*intellectual*' *Encyclopædias*; <sup>1</sup> or, while preserving the old forms, they took the ideas of Fichte as their starting-point and as the criterion of their judgment, to guide them as to what improvement was to be made in the several brauches of Jurisprudence, and as to how the science was to be cultivated in principle so as to satisfy the movements of life. <sup>2</sup>

It was indeed an age of movement, an age in which the importance of Philosophy in relation to Right and

<sup>1</sup> Mühlenbruch, *Encyc. u. Method. des pos. Rechts.* Rostock 1807.—Konopak, *Ueber den Begriff u. Zweck d. Encyclop. im Allgemeinen u. der Encyclop. der Rechtswiss. in Besondern.* Halle (2nd Ed.) 1806.—Dresler, *Ueber das Verhältniss des Rechts zum Gesetz. Eine Organonomie der Rechtsw.* Berlin 1803.—Gründler, *Inst. d. Rechts, enth. die Einleitung, Encycl. u. Method.* Erlangen 1809.—Wenk, *Encycl. u. Method.* Leipzig 1810.—Unterholzner, *Allg. Einl. in das jur. Stud.* München 1802.—Henke, *Ueber das Wesen der Rechtswissenschaft u. das Studium ders. in Deutsch.* Regensb. 1814.

<sup>2</sup> The most important and instructive of these works unquestionably is Rudhardt's *Encyclop. u. Methodol. der Rechtswissenschaft.* Würzb.

Law was universally recognised. It was the age in which History, Philology, and Philosophy joined in fair alliance to promote the cultivation of Jurisprudence, so that splendid results, both as regards form and method as well as real and material gain, were realized by their aid. Philosophy and the History of Right constitute the Science of Law, and in their union the spirit of their study found rest. This was also the 'shibboleth' of the movement in the department of Encyclopædia. But as these Encyclopædias were composed for the use of the schools, notwithstanding that *one* idea was taken as the basis of the development, system was sacrificed to form. The object was to initiate those who already knew Jurisprudence into the *spirit* of the science by Encyclopædia, and to lead the beginner on a higher way to the knowledge of it by Methodology. In the Encyclopædia, the authors sketch in brief outlines the derivation of the several branches of Jurisprudence from one principle, and this was called *the spirit of the Science*; in the Methodology, they carried out the sketch somewhat farther by an exposition of *the spirit of its study*. While the system was thus brought near to completion on the one side, it had again to be rent asunder on the other. Love for the study of Law was at least awakened, and an end was put to that mechanical aggregation by which the principle

1812.—The following may also be referred to:—Meyer, *Anleitung zur Rechtserlernung für Deutsche*. Eisenach 1818.—Schnauber, *Wissenschaftslehre d. Rechts*. Jena 1819.—Löbell, *Lehrbuch der jur. Encycl. u. Method.* Giessen 1819.—Wening, *Ueber den Geist des Studiums der Jurispr.* Ein Programm. Landsh. 1814. *Lehrbuch der Encycl. u. Methodol. der Rechtsw.* 1821. In the Programme he unfolds in graphic language, and in a thoughtful way, the same thoughts as Fenerbach presents in his work on 'Philosophy and Experience in their relation to positive Jurisprudence,' 1804.

of Right was buried in a soulless mechanism; yet after all, anything like a really living insight into the inner connection of its organism, still remained but a pious wish as before.

*Hummel*<sup>1</sup> was the only writer who made an attempt, which may be characterized as large and logical in its plan, although abortive in its execution, to construct an Encyclopædia of Jurisprudence on the basis of Fichte's Doctrine of Science and Schelling's Idealism. The first division of the first volume contains a 'speculative part'; the following volumes are devoted to the dogmatic and historical exposition of the Roman Law in all its extent; and the whole is composed, not for beginners, but for matured readers. The speculative part is so completely invested in the fashion of Schelling's philosophy, and so impregnated with its peculiar terminology,<sup>2</sup> that any clear representation of the sphere of Right is sought in vain. This work, however, still continues to be of importance from the richness of its contents, its logical treatment, and its exposition of the gradual development of positive Law, viewed from a higher standpoint than that which is usually taken. But how little it satisfied the requirements of the subject, was shown by the scant appreciation it received, notwithstanding the felt want of the time.

With all these conscientious efforts, and after the labour of many years, the main problem thus remained still unsolved. This problem was *how to unfold a System developed through all the branches of science, enclosed in itself, and elaborated likewise in the so-called Special*

<sup>1</sup> Einleitung in das gesammte pos. Recht, aus dem Standpunkte der Wissenschaft. 4 Bd. Giessen 1804.

<sup>2</sup> Thus History is called 'potentiated objectivity!'

*Sciences.* The fulfilment of this task was the powerful work of HEGEL, 'who has the merit of having grasped in the grandest style the relations which furnish the foundations of Right and Morality, as well as Religion and Art, as formed and developed in Universal History, and of having carried out the attempt to make the vast sphere of history intelligible from his standpoint.' It lies beyond our purpose to analyse this standpoint more closely here, although it might well be done without prejudice to its immortal glory of having produced the first and still the only great example of a truly 'wonderful architec-tonic' of the whole circle of knowledge. In this relation, the writings of Hegel that bear upon our subject, are still unsurpassed, both as regards the scientific form of their exposition and the logical incisiveness and sequence of the system. By the keen edge of the dialectic developed in Hegel's treatment of the Philosophy of Right, there fell, as if cut down with one blow, a whole forest of misunderstandings regarding the relation of Jurisprudence and positive practical Law to Philosophy. And no sooner was this done than the most difficult problem in the sphere was solved, in the classification of juristic Science according to one leading principle, and juristic Encyclopædia became what it ought to be, an artistic system constructed upon the solid foundation of one supreme principle. But Hegel wrote a System, not of Jurisprudence merely, but of all the Sciences, and this explains the fact, which has been so often urged against him, that he gave only the most necessary outlines of Jurisprudence.<sup>1</sup> But what was too heavy a burden for the shoulders of the master was taken up by

<sup>1</sup> *Grundlinien der Philosophie des Rechts, oder Naturrecht und Staatswissenschaft im Grundrisse.* Berlin 1821. (Werke, Bd. viii.)

the disciples, who conscientiously helped to bear it. The territory at least was won. The system of Right, like everything human, had its starting-point placed in Reason; it was viewed as reflected in the relationships of life, and was assigned as a science to History. This idea was the thread which guided his successors, the most distinguished among whom have been Puchta,<sup>1</sup> and Abegg.<sup>2</sup> As regards their philosophical principles, both followed the order of the Hegelian system, and it is only in their special knowledge of what is properly positive that they have any advantage over him. Controlled by his influence, they have at least formally advanced beyond the old defects of the division of the subject, into Encyclopædia and Methodology.

The more recent Encyclopædias cannot be said to have the same degree of merit in the way of philosophical grounding and internal connection; and, accordingly, they mostly give either abstract jural conceptions, with a survey of Jurisprudence,<sup>3</sup> or they present what is most worth knowing in the several branches of the science.<sup>4</sup>

<sup>1</sup> PUCHTA, *Grundriss zu Vorlesungen über juris. Encyclop. u. Methodol.* Erlangen 1822. Afterwards as *Introduction to his Cursus der Institutionen.* [This is what is translated in the foregoing pages of this work as Part I. But Puchta rather finds his standpoint in Schelling and the Historical School than in Hegel.—TR.]

<sup>2</sup> Abegg, *Encyclop. u. Methodol. der Rechtsw. im Grundrisse, Nebst einer Abhandlung über die wissenschaftliche Darstellung des Rechts.* Königs. 1823. [Abegg is essentially Hegelian.—TR.]

<sup>3</sup> v. Weber, *Ueber das Studium der Rechtswissenschaft.* Tübing. 1825.—WARNKÖNIG, *Vorschule der Institut. u. Pandekt.* Freib. 1837. [Juristische Encyclopädie oder Organische Darstellung der Rechtswissenschaft. Erlangen 1853.]—TITTMANN, *Handbuch für angehende Juristen.* Halle 1828.—Vogel, *Lehrbuch d. Encyclop. u. Method.* Leipz. 1829, 1840.—Arndt's *Grundriss der jur. Encyclop. u. Methodol.* München 1843.

<sup>4</sup> v. Löw, *Einleitung in das Studium d. Rechtswissenschaft.* Zürich

It is only here and there in scattered philosophical ideas and representations of the history of Jurisprudence that these more recent Encyclopædias can be said to rise above the pre-Hegelian standpoint. The same remark applies to the Encyclopædias that have lately appeared outside of Germany, in Holland, and elsewhere.<sup>1</sup>

The juristic Encyclopædia of *Falck*<sup>2</sup> has real merits. It has found a wide circulation, and been often used as the basis of lectures in Germany. Falck aimed at communicating to the young students the elementary knowledge necessary for the future study of Jurisprudence as a science, and he has done this with the greatest care and erudition. *Welcker*<sup>3</sup> and *Perthaler*<sup>4</sup> have also endeavoured to further the intelligent study of Jurisprudence in another way, and in productions distinct in their arrangement and compass. In his work, which was planned to fill six volumes, Welcker sought by 'throwing off the livery of the guild,' and adopting a freer and more

1835 (a book distinguished by a select Chrestomathy of Sources).—Barth, Vorlesungen : I. Bund, Jurist. Encyclopædie und das Naturrecht bis zum natürl. Staatsrecht. Augsburg 1835.—Stoeckhardt, De recta Icti ernditione. Lips. 1840.—Allgemeine Jurist. Fundamentallehre. Petersburg 1837. — Jurist. Propädeutik, oder Vorschule der Rechtswissenschaft. Petersb. 1839. 2nd Ed. enlarged. Leipz. 1843.

<sup>1</sup> Anne den Tex, Encyclopædia Jurisprudentiæ. Amstel. 1839.—A. Roussel, Encyclopædie du Droit. Bruxelles 1843.—A. Eschbach, Cours d'Introduction generale à l'étude du Droit, ou Manuel d'Encyclopædie juridique. 2 Ed. Paris 1845.

<sup>2</sup> Falck, Juristische Encyclopædie. Leipz. 1821. [5th Ed. by Ihering, 1850. Translated into French by Professor Pellat, of Paris, in 1841. Part III. of the present work is translated from Falck's *Encyclopædie*. See Preface.—Tr.]

<sup>3</sup> Die Universal- und die juristisch-politische Encyclopædie und Methodologie. 1 Bd. Stuttg. 1829. [This work remains a fragment.—Tr.]

<sup>4</sup> Recht und Geschichte. Zur encyclopädischen Einleitung in das Studium der juridisch-politischen Wissenschaften. Wien 1843.

generally accessible form, to respond to the interest of a general political culture, and at the same time to satisfy the requirement of academic studies and lectures. His aim was a final union of the philosophical and historicopositive elements, and the healing of the unhealthy dividedness of life and science. He found the means for this end in a systematic arrangement of individual things under common fundamental principles. These principles were summarized by him as Nature, Freedom, and History. By the aid of the analytical method of development, he seeks to construct upon them the whole sphere of life and knowledge, and in going backwards from what was complex to what was simple, he aims at giving a fundamental exposition of the organism of the actual objective human science. With him as with Perthaler, history is at once the basis and starting-point of the whole. Both of them possess a lofty enthusiasm for their subject, and a poetical and eloquent vividness of style. But however much we may agree with them in holding that history is the regulated development of mankind, yet, notwithstanding its unity, history can never form the ultimate principle of a system. History is the reality of the human spirit. We ought to grasp it scientifically, but its unity only comes into existence in being known. Hence history is not the centre of the process of knowledge, and our problem is how to comprehend the infinite contents of the past by means of conceptions representing it, and organically connected into a whole with the present. History is the product of human activity; and our work in science aims at the knowledge of this product. The introductory writings of Scheidler<sup>1</sup> arose from the same sentiment, and were

<sup>1</sup> Paränesen für Studierende. Erste Abth. Deutscher Fürstenspiegel,

devoted to the same end. By the consideration given to the most important problems of the time and the warmth of the style of exposition, they compensated for many defects of another kind.—We may conclude this historical survey by a reference to the recent work of Piitter,<sup>1</sup> which has the great merit of being philosophical in its treatment of the whole subject, and it is one of the few which are beginning to be in earnest with a universal History of Right.

[The more important of the Juristic Encyclopædias that have appeared since the publication of Dr. Friedländer's 'System' (1847) may be briefly referred to.—The 'Juristic Encyclopædia and Methodology' of L. Arndt<sup>2</sup> is a short sketch, but it is distinguished by the clearness and precision of its definitions. The Encyclopædia of A. Viroszil,<sup>3</sup> from the standpoint of the Kantian doctrine of Right, gives a comprehensive survey of the subject, with guidance to knowledge of the literature of the Austrian Jurisprudence. The work of Friedlieb<sup>4</sup> presents an exposition of the principles, sources, and material of Jurisprudence somewhat after the historical manner of Hugo.—The Encyclopædia of Blume<sup>5</sup> contains a general Encyclopædic Introduction to Jurisprudence, but it is mainly occupied with an exposition of the

1842. Zweite Abth. Parän. Propädeutik für das Studium der Rechtswiss. Jena 1842.

<sup>1</sup> Der Inbegriff der Rechtswissenschaft, oder Juristische Encyclopädie u. Methodologie. Von Dr. K. Th. Pütter, Prof. d. R. zu Greifswald. Berlin 1846. [Pütter and Friedländer both write from the standpoint of the Hegelian Philosophy.—Tr.]

<sup>2</sup> [Juristische Encyclopædie und Methodologie. 2 Aufl. 1850.]

<sup>3</sup> [Encyclopædie uud Methodologie des juridisch-politischen Studiums. Ofen 1852.]

<sup>4</sup> [Juristische Encyclopædie. Kiel 1853.]

<sup>5</sup> [Encyclopædie der in Deutschland geltenden Rechte, 1847-52.]

German System of Rights, which, although it deals with the System from the point of view of the Comparative Method, does not essentially advance beyond the works of the Nettelblatt period.

[The comprehensive work of Warnkönig (1853)<sup>1</sup> marks an important advance in the treatment of the subject. Founding upon the organic conception of the Science of Jurisprudence as a whole, with a wide knowledge of its several parts, and a large command of all juristic literature, Warnkönig presents a careful eclectic exposition of the whole subject, with a praiseworthy survey of the Universal History of Jurisprudence and useful Bibliographical references; but his philosophical insight is limited, and his treatment of fundamental conceptions is external and inadequate.—A similar effort is carried out with more insight, vitality, and suggestiveness by Dr. H. Ahrens,<sup>2</sup> who applies the positive, organic, and ethical conception of the philosophy of Krause to Jurisprudence, with a firm grasp of fundamental principles, a clear survey of the Universal Historical Movement, and a fertile elaboration in detail.—Ferdinand Walter,<sup>3</sup> distinguished by his knowledge of Church Law and an earnest philosophical reflectiveness, although belonging

<sup>1</sup> [Juristische Encyclopädie, oder organische Darstellung der Rechtswissenschaft mit vorherrschender Rücksicht auf Deutschland. Zum Gebrauch bei Vorlesungen und zum Selbststudium. Von Dr. L. A. Warnkönig. Erlangen 1853.]

<sup>2</sup> [Juristische Encyclopädie, oder organische Darstellung der Rechts- und Staatswissenschaft, auf Grundlage einer ethischen Rechtsphilosophie. Von Dr. H. Ahrens, etc. Wien 1855. Part IV. of the present work is a translation of the most relevant of the important sections of this work of Ahrens, which is much less known than his world-famed *Cours de Droit Naturel*. See the Preface to Kant's *Philosophy of Law* for the works of Krause, Röder, and Ahrens.]

<sup>3</sup> [Juristische Encyclopädie. Bonn 1856.]

to the *Juristi papizantes*, has produced an encyclopædic sketch characterized by clearness of exposition, historical grasp, and organic treatment of the German system of his time. The most important recent Encyclopædia, from the standpoint of contemporary juristic science in Germany, is the 'Encyclopædie' edited by Professor Franz von Holtzendorff of Munich.<sup>1</sup> This work is representative of the present advanced state of the Juristic Sciences in the German Universities. Its distinct and organic arrangement, and the consecutive and historical method of the discussions, indicate the encyclopædic order of the Science, which, however, is presupposed

<sup>1</sup> [Encyclopædie der Rechtswissenschaft, in systematischer Bearbeitung. Herausgegeben unter Mitwirkung vieler Rechtsgelehrter. Von Dr. Franz von Holtzendorff, Professor der Rechte in München. Vierte umgearbeitete und theilweise vermehrte Auflage. Leipzig 1882.—The contents of the systematic part (pp. 1390) of this important work will of themselves give some indication of its method and value. The writers of the several Articles are all recognised authorities in Germany on the subjects of which they treat, and each Article is carefully worked up to date, with historical and bibliographical references :—

**I. Philosophische Einleitung in die Rechtswissenschaften.** Von Prof. Dr. A. Geyer in München.

**II. Die geschichtlichen Grundlagen der Deutschen Rechtsentwicklung und die Rechtsquellen.**

1. Geschichte und Quellen des *Römischen Rechts*. Von K. G. Bruns. Durchgesehen von Prof. Dr. A. Pernice in Berlin.
2. Geschichte und Quellen des *Kanonischen Rechts*. Von Prof. Dr. Paul Hinschius in Berlin.
3. Geschichte und Quellen des *Deutschen Rechts*. Von Prof. Dr. Heinrich Brunner in Berlin.
4. Ueberblick über die Geschichte der *Französischen, Normannischen, und Englischen Rechtsquellen*. Von Prof. Dr. Heinrich Brunner in Berlin.
5. Ueberblick über die Geschichte der *Nordgermanischen Rechtsquellen*. Von Prof. Dr. Konrad Maurer in München.
6. Die neueren *Privatrechts-Kodificationen*. Von Prof. Dr. J. Fr. Behrend in Greifswald.

and involved rather than explicitly discussed. While dealing with the subject from the German standpoint and interest, the work is of great value and importance to all students of Jurisprudence.<sup>1</sup>

[In Italy, where 'the Philosophy of Law has been

### III. Das Privatrecht.

1. *Das heutige Römische Recht.* Von Prof. Dr. K. G. Bruns. Durchgesehen von Prof. Dr. E. Eck in Berlin.
2. *Das Deutsche Privatrecht.* Von Prof. Dr. J. Fr. Behrend in Greifswald.
3. *Das Reichscivilrecht.* Von Prof. Dr. G. Mandry in Tübingen.
- 4, 5, 6. *Das Handels- See- und Wechselrecht.* Von Prof. Dr. Wilhelm Endemann in Bonn.
7. *Das Französische Civilrecht.* Von Prof. Dr. A. Rivier in Brüssel.
8. *Internationales Privatrecht.* Von Prof. Dr. L. von Bar in Göttingen.

### IV. Das öffentliche Recht.

1. *Civilprozess.* Von Prof. Dr. L. von Bar in Göttingen.
2. *Das Kirchenrecht.* Von Prof. Dr. Paul Hinschius in Berlin.
3. *Das Strafrecht.* Von Prof. Dr. A. Geyer in München.
4. *Der Strafprocess.* Von Prof. Dr. R. E. John in Göttingen.
5. *Das Deutsche Verfassungsrecht.* Von Prof. Dr. von Holtzendorff in München.
6. *Das Verwaltungsrecht.* Von Prof. Dr. Ernst Meier in Halle.
7. *Das Europäische Völkerrecht.* Von Prof. Dr. von Holtzendorff in München.

### Anhang.

1. *Das Deutsche Fürstenrecht in seiner Entwicklung und gegenwärtigen Bedeutung.* Von Prof. Dr. Hermann Schultze in Heidelberg.
2. *Die Entwicklung der Englischen Parliaments-verfassung.* Von Prof. Dr. R. Gneist in Berlin.

<sup>1</sup> [The latest German Juristic Encyclopædia is that of Professor A. Merkel of Strassburg (*Juristische Encyclopädie*, 1885). It is a clear, concise sketch, containing excellent definitions and a well-sustained exposition of fundamental conceptions. The *Rechtslexicon* (2 Bd., Leipzig, 1875), or Alphabetical part of Dr. v. Holtzendorff's *Encyclopädie*, also contains many valuable Articles of general interest.]

cultivated, in recent times, with a great zeal and intelligent appreciation of the high practical importance of the Science' (Ahrens),<sup>1</sup> the subject of Juristic Encyclopædia has also been dealt with by Albini,<sup>2</sup> Boncompagni,<sup>3</sup> and others.<sup>4</sup>—TR.]

<sup>1</sup> [Cours du Droit Naturel, p. 327.]

<sup>2</sup> [Enciclopedia del Diritto, 1846.]

<sup>3</sup> [Introduzione alla scienza del Diritto, 1847. Boncompagni generally follows Krause's principles.]

<sup>4</sup> [For other works on the subject in Italian, see the Bibliographical Note in Kant's *Philosophy of Law*, p. xxix. The important work of Professor Carle, of Turin, on the Philosophy of Law (*La Vita del Diritto*, etc.), there specially referred to, may be again commended to the attention of the students. Its historical breadth and vital method are in entire harmony with the spirit and object of this 'Introduction.' Professor Lioy's able exposition of the *Philosophy of Right*, with the *Préface* of his French Translators, has been noticed in the Preface to the present work.]

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